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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1963

No. 336

WANDA MERCER, PETITIONER,

vs.

PARIS THERIOT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 5, 1963
CERTIORARI GRANTED NOVEMBER 18, 1963

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 7, 1964

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IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 17214

PARIS THERIOT, Appellant,

versus

MRS. WANDA MERCER, Appellee.

Transcript of Record—Filed April 29, 1958

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
No. 6072 Civil Action

MRS. WANDA MERCER,

versus

PARIS THERIOT.

CAPTION

APPEARANCES:

Robert G. Hughes, Esq., Edward T. Diaz, Esq., A. J. Fortier, Jr., Esq., Attorneys for Defendant-Appellant.

H. Alva Brumfield, Esq., Attorney for Plaintiff-Appellee.

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States

Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 30th day of January, 1958, at the City of New Orleans, Louisiana.

Extension of time granted by the Honorable United States District Court for the Eastern District of Louisiana bringing the return date up to and including April 30, 1958.

[fol. 2]

COMPLAINT—Filed August 30, 1956

To the Honorable, the Judges of the United States District Court, Eastern District of Louisiana, New Orleans Division.

The complaint of Mrs. Wanda Mercer, with respect, represents:

1.

That complainant is a resident and citizen of the state of Texas, being domiciled at San Angelo therein.

2.

That Paris Theriot, defendant is a resident and citizen of the State of Louisiana, being domiciled in Golden Meadow therein.

3.

That this is an action for damages involving an amount in excess of $3,000.00, exclusive of interest and costs and is wholly between citizens of different states.

4.

Complainant now shows that she is the surviving widow of Willie Byrd Mercer.

5.

That Willie Byrd Mercer was walking along the shoulder of Louisiana Highway 1, about three feet from the edge of the concrete in a northerly direction, near the end of Island, west of Grand Isle, Louisiana, about 7:30 o'clock, p.m., on [fol. 3] the 18th day of December, 1955.

6.

Complainant further shows that at the said time and place, an automobile owned and being operated by the defendant Paris Theriot, traveling at a rapid rate of speed, came off the paved portion of the said highway, striking complainant's husband from the rear, with great force, causing injuries from which he died sometime during the night of December 18, 1955.

7.

Complainant further shows that the accident was due to the gross and wanton negligence of the defendant Paris Theriot in operating his automobile at an excessive rate of speed, in failing to keep a proper lookout, in failing to have his vehicle under proper control, and in failing to drive said vehicle upon the paved portion of the highway and in driving while under the influence of intoxicating beverages.

8.

Petitioner now shows that at the time of the said accident and at the death of her husband, he was employed by Horton and School Craft, earning the sum of $150.00 per week.

9.

That at the time of his death, her husband was 32 years of age and enjoyed good health.

[fol. 4]

10.

Complainant now shows that she itemizes her damages as follows, to wit:

Funeral expenses incurred	$ 700.00
Pain and suffering of her deceased husband	10,000.00
Loss of support	54,000.00
Loss of love and companionship	54,000.00

or a total of $118,700.00.

11.

Complainant further shows that she desires a trial by jury on all issues.

Wherefore, complainant prays for service and citation of this petition upon the defendant and that he be duly cited to appear and answer hereto and after all legal delays and due proceedings had, that there be judgment herein in favor of complainant, Mrs. Wanda Mercer, and against the defendant, Paris Theriot, for the full sum of $118,700.00 together with legal interest thereon from judicial demand until paid, and for all costs of this suit.

Complainant further prays for a trial by jury, all necessary orders, general and equitable relief.

By Attorney: H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, Louisiana.

[fol. 5] IN UNITED STATES DISTRICT COURT

ANSWER—Filed October 31, 1956

Defendant, Paris Theriot, answers plaintiff's petition as follows:

First Defense

The complaint does not state a claim against defendant upon which relief can be granted.

Second Defense

Categorically answering the allegations of said petition, defendant admits Article 2. For lack of sufficient information justify a belief therein, defendant denies Articles 1, 3, 4, 5, 6, 7, 8, 9 and 10 of said complaint.

Third Defense

Further answering, defendant states that he has been informed that the body of Willie Byrd Mercer was found on the highway at Grand Isle, Louisiana, at about 6:30

o'clock on the morning of December 19, 1955, but defendant says that, if said Willie Byrd Mercer was struck by a vehicle at any time prior thereto, defendant denies that he was the driver of said vehicle.

Wherefore, defendant prays for judgment dismissing plaintiff's complaint at her costs, and for all general and equitable relief.

Doyle & Hughes, 1702 American Bank Bldg., New Orleans 12, La., Attorney for Defendant; By Robert G. Hughes.

[fol. 6] IN UNITED STATES DISTRICT COURT

INTERROGATORIES—Filed May 7, 1957

Interrogatories propounded by complainant, Mrs. Wanda Mercer, to defendant, Paris Theriot, to be answered under oath by said defendant.

#1. Please list the names and addresses of all persons having any knowledge or information concerning any relevant facts involved in this litigation.

#2. Please list the names and addresses of any and all persons who might be considered expert witnesses, having any knowledge or information concerning any relevant facts involved in this litigation.

#3. Are there any photographs in your possession or under your control or anyone, agents, servants, employees or representatives or attorneys of any tangible physical object or objects or anything else which constitutes or contains evidence material to any matter involved in this suit. If such photographs do exist, please state when they were taken, by whom and where they are located at the present time and if the attorney for the plaintiff may see and inspect these photographs and if so, please state when and where such inspection can be made.

These interrogatories are to be deemed continuing so as to require supplemental answers under oath, in writing from defendants at any time that additional information

[fol. 7] may be obtained, after responses are filed to these interrogatories which would be furnished if the interrogatories should be continuously repeated.

By Attorney: H. Alva Brumfield

In United States District Court

Minute Entry of Order Fixing Date of Trial —May 24, 1957

Wright, *J.*:

It Is Ordered that trial of this case be and the same is hereby set for 10:00 A.M., October 17, 1957.

It Is Further Ordered that twenty (20) days before trial, each side shall file a Note of Evidence (a) stating the names of witnesses who may be used and identifying the type of testimony to be given by each; (b) listing the documents, properly identified by number, which may be offered in evidence, copies of these documents to be attached to the Note of Evidence. If objection is not made within ten (10) days of filing, the authenticity of the documents, or copies thereof, will be admitted.

It Is Further Ordered that ten (10) days before trial, each side shall file a second, or rebuttal. Note of Evidence (a) stating the names of any additional witnesses who may [fol. 8] be used and identifying the type of testimony to be given by each; (b) listing any additional documents, properly identified by number, to be offered in evidence, copies of these documents to be attached to the Note of Evidence. If objection is not made within ten (10) days of filing, the authenticity of the documents, or copies thereof, will be admitted.

It Is Further Ordered that absent showing a good cause only witnesses named and documents identified in the Note of Evidence will be allowed to testify or admitted in evidence.

IN UNITED STATES DISTRICT COURT

ANSWER TO INTERROGATORIES—Filed August 8, 1957

Now comes Paris Theriot and answers the interrogatories propounded by plaintiff as follows:

I.

Answering Interrogatory No. 1 defendant has no witnesses on the occurrence of the accident in this case.

II.

Answering Interrogatory No. 2 defendant at this time has no expert witnesses.

III.

Answering Interrogatory No. 3 defendant has no photographs in his possession.

[fol. 9] PARIS THERIOT

Sworn to and subscribed before me this 29th day of July, 1957.

Edward T. Diaz
Notary Public

IN UNITED STATES DISTRICT COURT

DEFENDANT'S NOTE OF EVIDENCE—Filed October 1, 1957

Defendant may use the below named witnesses on the trial of this case which is set for October 17, 1957.

Paris Theriot, Leo Terrebonne, Maurice Terrebonne.
Who will testify to certain facts the day of the alleged accident.

Billy Gautreau who will identify the attached photographs.

Documentary Evidence

Five photographs marked for identification Theriot 1-5.

Submitted,

ROBERT G. HUGHES, Attorney for Defendant.

[fol. 10]

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S NOTE OF EVIDENCE—Filed October 2, 1957

The names of witnesses that may be used by plaintiff in the trial of this cause are as follows:

1. Trooper Douglas Millett, c/o Troop B., State Police Headquarters, New Orleans, Louisiana, will testify as to his investigation of the circumstances surrounding the accident.

2. W. J. "Billy" Gautreau, Sheriff's Office, Jefferson Parish, Kenner, Louisiana, will testify as to the circumstances surrounding the investigation of the accident and the identity of the pictures he made of the accident.

3. John Stewart, 2501 Williams Boulevard, Kenner, Louisiana, will testify concerning circumstances of the accident.

4. Sgt. Red Prudhomme, c/o Jefferson Parish Sheriff's Office, East Bank Office, Kenner, Louisiana, will testify as to facts concerning his investigation of the accident.

5. Dr. Joseph H. Davis, New Orleans Morgue, New Orleans, Louisiana, will testify as to his findings from the autopsy he performed on the deceased.

6. Mrs. Eugene Herron, 114 Dewherst Street, San Antonio, Texas, will testify as the widow of the deceased.

7. Lewis E. Bradberry, c/o Bayou Rigaud Store, Grand Isle, Louisiana, will testify as to the fact that Paris Theriot [fol. 11] was at Grand Isle and as to the amount of intoxicating liquors he drank.

8. Officer Jesse M. Folse, Box 124, Lockport, Louisiana, will testify as to his investigation of the facts surrounding the accident.

9. Paris Theriot, for cross examination, Golden Meadow, Louisiana, to testify as to his whereabouts at the time of the accident.

10. George Gillespie, address unknown at this time, will testify as to the investigation of the said accident.

11. Mr. Dave Lee Fink, Grand Isle, Louisiana, will testify as to the whereabouts of Paris Theriot and as to his drinking.

12. Mrs. Dave Lee Fink, Grand Isle, Louisiana, will testify as to the whereabouts of Paris Theriot and as to his drinking.

13. Harris Adams, Grand Isle, Louisiana, will testify as to the drinking of Mr. Theriot.

14. Leo Terrebonne, Grand Isle, Louisiana, will testify as to the whereabouts of Paris Theriot and as to his drinking.

15. Deputy Sheriff Gilbert Duet, Lafourche Parish, Golden Meadow, Louisiana, will testify as to his investigation of the accident.

16. Nelson Guidry, Golden Meadow, will testify as to the circumstances of the investigation.

[fol. 12] 17. Marshal Nolan Plaisance, Golden Meadow, Louisiana, will testify as to the investigation.

18. Clifford A. Santiny, Grand Isle, Louisiana, will testify as to the whereabouts of Paris Theriot on the date of the accident.

Documents which may be offered in evidence are:

1. The Coroner's Day Report, a copy of which is attached.

2. A copy of the autopsy and protocol report.

3. A copy of the Death Certificate, a copy of which is attached.

4. Seventeen (17) photographs which have been shown to counsel for defendant, marked for identification, "Plaintiff 1-17".

By Attorney:

H. Alva Brumfield.

IN UNITED STATES DISTRICT COURT

DEFENDANT'S OBJECTION TO EVIDENCE OF PLAINTIFF—
Filed October 8, 1957

Objection is made to photographs marked Plaintiff 1-17 because they are not attached to plaintiff's note of evidence and may be otherwise objectionable.

Robert G. Hughes.

[fol. 13] IN UNITED STATES DISTRICT COURT

DEFENDANT'S SUPPLEMENTAL NOTE OF EVIDENCE
—Filed October 8, 1957

Defendant may use the below named witnesses on the trial of this case which is set for October 17, 1957, in addition to the witnesses named in defendant's original note of evidence:

Officer Jesse M. Folse
Mr. Dave Lee Fink
Mrs. Dave Lee Fink
Deputy Gilbert Duet
Marshal Nolan Plaisance

who will testify to certain facts and circumstances on the day of the accident.

Submitted,

Robert G. Hughes, Attorney for Defendant, 1702 American Bank Bldg., New Orleans, La., CA 2249.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY OF CASE CALLED AND HEARING AND CONTINUANCE—October 17, 1957

WRIGHT, *J.*:

This cause was this day called for trial.

Present: H. Alva Brumfield, Esq., Attorney for Plaintiff.

Robert G. Hughes, Esq., Edward J. Diaz, Esq., A. J. Fortier, Jr., Esq., Attorneys for Defendant.

[fol. 14] Counsel for plaintiff moved to amend complaint —Denied.

The following named jurors were called and sworn on their voir dire and being acceptable to all parties were sworn to well and truly try the issue joined herein, to-wit:

1. Alexander Bruce Hay
2. Mrs. Bertie King Jones
3. Otis B. Alexander
4. Martin F. Garcia
5. Ferrick J. Hallaron
6. John L. Galivan
7. Miss Hilda M. Olivier
8. Robert B. Gallegly, Sr.
9. John D. Mailhes, Sr.
10. Elias Rau
11. Miss Christine M. Wagner
12. Earl J. Magner

Balance of panel were excused subject to call.

On motion of counsel for plaintiff, witnesses were called, instructed & segregated.

Opening statements by counsel for parties.

Witnesses for Plaintiff:

W. J. Gautreau—sworn by Dy. Clk.
Paris Theriot—(under x-exam.) sworn by Dy. Clk.
Hubert Louis Prudhomme— do
Douglas M. Milett— do
Nelson Guidry— do
Louis E. Bradberry— do
Gilbert Duet— do
John Miller— do
Mrs. Wanda Mercer Herron— do

Counsel for plaintiff announced that he would rest.

Counsel for defendant moved for directed verdict—Overruled.

Witnesses for Defendant:

Paris Theriot—previously sworn.

Maurice Terrebonne—sworn by Dy. Clk.

The matter was continued until tomorrow morning at 10 A.M. The Court cautioned the jury not to discuss the case [fol. 15] amongst themselves, etc.

In United States District Court

Minute Entry of Further Hearing and Verdict —October 18, 1957

Wright, *J.*:

This cause as continued from yesterday was this day resumed; counsel for the respective parties, as well as the jurors empanelled in said cause, being all present, the trial was proceeded with.

Witnesses for Defendant:

Jesse M. Folse—sworn by Dy. Clk.
Leo Terrebonne— do

Counsel for defendant announced that he would rest. Counsel for plaintiff stated likewise.

Jury withdrawn—counsel for defendant moved for directed verdict—argument Denied. Jury returned to courtroom.

Argument—Court charged jury—jury retired—jury returned with following verdict to-wit:

"We, the Jury, find for the plaintiff in the amount of $25,000.00"

"Elias Fau
Foreman.

"October 18, 1957."

It Is Ordered by the Court that the verdict be recorded and it is done accordingly and the jury excused subject to [fol. 16] call.

IN UNITED STATES DISTRICT COURT

JUDGMENT—October 25, 1957

WRIGHT, *J.*:

By reason of the verdict of the jury rendered herein, and in accordance therewith;

It Is Ordered, Adjudged and Decreed by the Court that judgment be and is hereby entered in favor of Plaintiff, Mrs. Wanda Mercer Herron, and against Defendant, Paris Theriot, in the true and full sum of Twenty Five Thousand and no/100 ($25,000.00) Dollars, together with legal interest and costs.

IN UNITED STATES DISTRICT COURT

TRANSCRIPT OF PROCEEDINGS IN OPEN COURT
—Filed March 28, 1958

APPEARANCES:

H. Alva Brumfield, Esq., American Bank Bldg., 118 St. Louis Street, Baton Rouge, Louisiana, Attorney for Plaintiff.

Robert G. Hughes, Esq., Edward J. Diaz, Esq., A. J. Fortier, Jr., Esq., American Bank Building, New Orleans, Louisiana, Attorneys for Defendant.

(The above entitled and numbered matter came up for trial on this, the 17th and 18th days of October, 1957, in the Courtroom, U. S. Post Office Building, New Orleans, Louisiana; The Honorable J. Skelly Wright, District Judge, presiding.)

[fol. 17] PROCEEDINGS

Morning Session

The Court: In Civil Action Number 6072, Wanda Mercer versus Paris Theriot, is the Plaintiff ready?

Mr. Brumfield: The Plaintiff is ready.

The Court: Is the Defendant ready?

Mr. Hughes: The Defendant is ready.

Mr. Brumfield: May I approach the Bench?

The Court: Yes.

(Conference of the Court and Counsel.)

MOTION TO AMEND COMPLAINT AND DENIAL THEREOF

Mr. Brumfield: May it please your Honor, at this time I would like to move to amend the complaint in this case instanter by the addition of the insurer in this case, The Hartford Accident & Indemnity Company. Mr. Hughes represents that company, and the Defendant Paris Theriot has his own Counsel. This information was learned from the deposition that was taken of Mr. Theriot, but through an oversight on my part this insurer was not made part of [fol. 18] these proceedings. We don't see how anyone would be prejudiced in this matter by the addition of the party Defendant.

Mr. Hughes: I object to the motion, however, at this time I have no authority to—

The Court: The Court will deny the motion.

Call the Jury.

(Whereupon, a Jury of twelve was duly empaneled and sworn.)

The Court: The balance of the Jury panel is excused subject to call.

You may proceed.

Mr. Brumfield: May we have the witnesses called?

The Court: Give the names of your witnesses to the Crier.

(Witnesses called.)

Mr. Brumfield: May it please your Honor, I believe they all answered except Sergeant Red Prudhomme and State Trooper Jesse Folse.

The Court: Ladies and gentlemen, you are instructed not to discuss this case with anyone, particularly among your-[fol. 19] selves while you are in the witness room. It is important that we have the individual testimony of each and every one of you, uninfluenced by any conversation or discussion you may have had with others who have some knowledge of the issues in suit here. You will be sworn as you take the witness stand.

You will now go to the witness room.

(Thirteen witnesses sequestered.)

Mr. Hughes: May we approach the Bench?

The Court: Yes.

(Conference of Counsel and the Court outside the hearing of the Jury.)

The Court: Ladies and gentlemen, a Civil Case begins, as most of you already know, with opening statements; opening statement by Counsel for the Plaintiff, followed by an opening statement by Counsel for the Defendant. The purpose of the opening statement is to acquaint you with the case so that you may understand the evidence as it unfolds from the witness stand. What the lawyers, or what Counsel say now is not evidence in the case. What they say at any time during the case is not evidence, and what they say should be disregarded entirely by you altogether, unless it is supported by evidence which comes [fol. 20] from the witness stand.

You may proceed.

Opening Statement on Behalf of Plaintiff

Mr. Brumfield: May it please your Honor, and ladies and gentlemen of the Jury: At the very outset I might explain to you that I'm wearing this beard on advice of the doctors. I have some skin trouble, so if you will just bear with me. I wanted to make that explanation to you as to why—I am not incognito or trying to imitate anyone, or join the House of David.

As the Judge indicated to you, this is a case that presents for your consideration what we call a death action. Mrs. Mercer, this lady seated right here (indicating) was married to Byrd Mercer, and had been living with him for some time. He was an employee of a concern laying pipelines out into the Gulf to service those offshore wells. They were living down on Grand Isle in a Trailer Court. They were living in a trailer. He had been employed there for some time.

He would go out from the Grand Isle shore out into the Gulf, where he was working. Sometimes he would make a sixteen-hour shift; that he would go out in the morning and work all day, and work all that night, and he would come in.

On this particular day, December 18th, 1955, Mr. Mercer got up that morning—it was a Sunday morning—and went [fol. 21] to work out on this job. He did not return home that night. Mrs. Mercer, and as the Judge pointed out, was remarried this past May, a year and a half after her husband's death, and she didn't think too much about it because it had happened before that he would work on around the clock and come in the following morning. She thought that is what had happened in this instance.

Her husband's body was discovered early the Monday morning, on the right-hand shoulder of the asphalt concrete portion of this highway that is designated as Louisiana Highway Number 1, off on the shoulder, face down, killed. The evidence will show from photographs and from the investigating officers, that her husband was run over by an automobile. The coroner's findings, inquest, the autopsy that was made by the medical examiners, the pathologist, will be introduced in evidence to show in what manner he died. His neck was broken. The spleen was ruptured. His kidneys were ruptured, internal hemorrhage, and he died. He was killed.

This is a rather bizarre case. The Plaintiff is in the position of not having any eyewitnesses to bring here to this Court to testify as to what happened. The only eyewitness to this tragedy was the hit-and-run driver, and I know of no act that man commits upon man more despicable and cowardly than the hit-and-run driver.

We feel, and we are confident that after you hear all [fol. 22] of this evidence—it has to be circumstantial evidence, the position of the body, where this deceased was, the position of the driver of the car, the position of this driver and his whereabouts at the time that this accident and this death occurred, all will have to be placed into pattern in your own minds, drawing on your good common sense, to tell you what happened.

The evidence will show and conclusively prove, we are confident, that Mr. Paris Theriot is the man who was driving an Oldsmobile automobile, and he left a bar where he was drinking, at the Fisherman's Wharf on Grand Isle, and if any of you are familiar or have been down there on that lovely isle—I know I have been there—and he got there around noon on that Sunday. He stayed there all that afternoon drinking Scotch and water. He was a Scotch and water drinker. There will be conflicting testimony as to how much he did drink. There will be some witnesses who say he drank ten or fifteen, and some who say four or five. Mr. Theriot, himself, admitted that he'd had five or six.

At any rate, the evidence will show that he was in this bar all afternoon, and he left that bar around 7:00 or 7:15 that evening. The death is placed at around 7:00 7:30, 7:45 that same day, December 18th, 1955. He left the bar, by his own testimony and his admissions, driving this car alone. The evidence will show photographs made by investigating officers that there was a dent on the right-front [fol. 23] headlight and right-front fender, and the right portion of the hood of Mr. Theriot's car. The evidence will show that the officers took some scrapings of what appeared to be blood and hair from underneath this car on the axle, or that portion that connects the wheels, and there was scrapings taken from the top of the car, some whitish substance, which evidence was put in envelopes, and turned into the Sheriff's Office in Jefferson Parish, and then another mystery takes place. This evidence disappears. It never gets to the laboratory for analysis.

We have no explanation because we have not been able to find out what happened to it, but it just disappeared.

The evidence will show, from Mr. Theriot, that he said he had a recollection that Sunday around noon, right before

noon, or the morning before he went down to Grand Isle, that he ran into the back of a truck, and that some piece of lumber or wood in the truck flew out of the truck and made this indention—those photographs will be offered to you for your inspection so that you can determine whether a hard object or a soft object made those indentions on that automobile.

The evidence will show that Mr. Theriot made conflicting statements as to how these indentures or these dents came about on his automobile. At first, he will say that he [fol. 24] hit some animal or a cow that Sunday morning, and then later on he changes his story and says that he hit a truck, ran into the back of a truck, which truck never stopped. He didn't know who it was. He never learned the identity of this truck that he was supposed to have hit.

So I say to you ladies and gentlemen of the Jury, that this case will present a mystery, if you will, if you consider the lack of an eyewitness to the very instant of Byrd Mercer being struck from behind, as he was walking along the highway. But, after hearing all the evidence and these officers, and these witnesses as to what were the circumstances surrounding this occurrence and this tragedy, we feel confident that you will come to the same conclusion that we have, and that the officers have, and that is that Paris Theriot was a hit-and-run driver.

I might say this—Mr. Theriot might have hit Byrd Mercer and not even know that he hit him, because he was drinking, and the evidence will show that he was drinking rather heavily that afternoon. Then, the weather was bad. It was raining, and it was dark. But, as I say, I believe that after you had heard all of this evidence and you have listened, and which I know that you will, and after you have heard it and you consider all this evidence and put these facts together, and the surrounding circumstances, drawing upon your own good judgment, that you will agree with [fol. 25] us that Paris Theriot was responsible for the death of Byrd Mercer.

Of course, Mr. Paris Theriot is not on trial for negligent homicide, or for manslaughter. This is not a criminal proceeding. This is a civil action for damages for the death of a human being, and as the Judge, his Honor, will instruct

you, the person who has the right to bring this action and who is damaged, is the widow. Under the Laws of Louisiana she has brought this action and asks that you bring in a judgment to her for the element of damages that are permissible under the laws of this State, for the amount of the funeral bill to bury Mr. Mercer, $700.00, the pain and suffering of the deceased in those agonizing few moments or seconds when he was struck, and before he died. We ask that you fix or consider that element of damages and translate that into dollars and cents in the amount of $10,000. And, for the loss and support that this widow has sustained, because the evidence will show that he was making $150.00 a week. They were living together, happy and contented, and that he supported his wife. We ask that you fix that element of damage in the amount of $54,000.

Then, for the loss of love and companionship, which is an intangible thing, if you will, but yet so important to two people who have married and have lived together for all these years and suddenly to have that one loss. We ask that you fix that element of damages in the amount of $54,000 [fol. 26] making a total of $118,700.00.

Thank you very much.

Opening Statement on Behalf of Defendant

Mr. Hughes: Ladies and gentlemen, my remarks will be very brief. We will prove to you that Mr. Theriot's car was damaged before this unfortunate accident occurred. We will also prove to you by an eyewitness that at the time Mr. Theriot passed the scene of this accident nothing untowards had happened, and evidently the body wasn't lying there.

Our defense in this case is very simple. It is simply that the Defendant did not cause the death of this man.

Thank you.

The Court: Call your witness.

Offers in Evidence

Mr. Brumfield: May it please your Honor, I would like to offer, introduce, and produce in evidence the certified copy of the certificate of death—I have shown this to Mr. Hughes, opposing Counsel—and ask that it be marked Plaintiff-1.

The Court: Let's proceed.

(Whereupon, the document above referred to, marked Plaintiff-1 for identification, was received in evidence.)

[fol. 27] Mr. Brumfield: We would also like to offer, produce, and file in evidence the Coroner's Certificate showing the cause of death of Willie Byrd Mercer, and ask that that be marked Plaintiff—2.

We would also like to offer, produce, and file in evidence, in order to make the entire proceedings of the Coroner's Office complete, the laboratory examination and the Coroner's Office Day Record in this case, and ask them to be marked Plaintiffs—3A and 3-B.

(Whereupon, the documents above referred to, marked Plaintiff—2, Plaintiff—3-A, and Plaintiff—3-B, for identification, were received in evidence.)

Mr. Brumfield: We would also like to offer, produce, and file in evidence the true copy from the Coroner's Office of the pathologist—I mean of the autopsy report of the pathologist, Joseph H. Davis, M.D., and ask that that be marked plaintiff—4.

(Whereupon, the document above referred to, marked Plaintiff 4 for identification, was received in evidence.)

Mr. Brumfield: I would like permission to show these exhibits to the jury.

The Court: Just read to the Jury the pertinent parts, and [fol. 28] if you leave out any parts, Mr. Hughes can follow you by reading what parts he wants in there.

The death certificate shows Mr. Mercer was thirty-two years of age, and that he died on December 18th, 1955, at 7:30 P.M.

Mr. Brumfield: Judge, it has the cause of death, but it is in writing, and I think the Coroner's inquest shows it better.

The Coroner's inquest shows that Willie Byrd Mercer died on Grand Island, Louisiana, Grand Isle Road Number 1, near the Humble Oil camp, and that he was thirty-two years of age; white, and married, pipe-line worker, and "fracture dislocation neck, internal hemorrhage, ruptured liver and spleen, and fracture of left tibia and fibula."

And the record, the Coroner's record shows the same information, with the additional statement that the body was found at 6:30 A.M. on December 19th, 1955, and that the deceased was last seen at 7:15 P.M. on December 18th, 1955, and deceased worked for the Horton School Craft Pipeline Company, and the final diagnosis as shown on this report as well as the autopsy which was performed on the body of the deceased, Mr. Mercer, was, "Fractured dislocation of atlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of skull; rupture of spleen, liver, and both renal arteries; lacerations of scalp, [fol. 29] face right thigh, right hand and left leg."

We would now like to call Mr. William Gautreau.

WILLIAM GAUTREAU called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Will you please state your full name, please, sir?

A. William J. Gautreau, Jr.

Q. Where do you live, Mr. Gautreau?

A. I live at 200 Dilton Street, Jefferson Parish.

Q. And, are you connected in any official capacity in the Government of Jefferson Parish?

A. Yes, I am Deputy Sheriff assigned to the Coroner's Office, and I also do all the photographic work for the Coroner's Office.

Q. And on December 18th and 19th of 1955 were you connected with the Coroner's Office?

A. Yes, I was.

Q. And how long have you been in that kind of work?

A. About the three and a half or four years.

Q. Do you have an official status as an officer? Do you have a badge?

A. Yes. (Indicating)

Q. What is that?

A. Deputy Sheriff, Jefferson Parish.

[fol. 30] Q. And you are attached to the Coroner's Office, is that right?

A. Yes, sir.

Q. Now, did you receive a call or any communication with reference to the death of an individual by the name of Mercer on Grand Isle on December 18-19, 1955?

A. On the morning of December 19th I received the call from the office, the Sheriff's Office, in regard to a death on Grand Isle. Upon contact with the Coroner I was sent down to the Island to investigate the death and see that the body was brought into the morgue for an autopsy.

Q. When did you arrive at the scene?

A. I arrived at Grand Isle about 10:00 o'clock quarter to ten or 10:00 o'clock the morning of the 19th, December 19th.

Q. Was anyone with you?

A. Yes, I had a Deputy Sheriff, Hubert Prudhomme, who went down to handle the criminal investigation for the Sheriff's Office.

Q. When you got there was the body still there?

A. Yes, the body was still in the side of the road.

Q. Did you make any photographs of the scene at that time?

A. Yes, upon my arrival I immediately took photographs before anything was disturbed, after which identification [fol. 31] was made of the body.

Q. I show you, Officer Gautreau, thirteen photographs, and ask you if you will take them and examine them and identify these as photographs that you made? I will first show you seven photographs and ask you if these were photographs made at the scene? (Photographs to witness.) If these were made by yourself?

A. Yes, these are some of the pictures that I have taken.

OFFERS IN EVIDENCE

Mr. Brumfield: At this time, may it please your Honor, I would like to offer, produce, and file into evidence the seven photographs identified by the witness and ask that they be marked Plaintiff—1 to 7.

The Court: Mark them Gautreau—1 through 7.

Let's get them all together and get rid of them all at one

time. Have the witness stand in front of the Jury so that the Jury can see what he is talking about.

(Whereupon, the photographs above referred to, were marked Gautreau—1, Gautreau—2, Gautreau—3, Gautreau—4, Gautreau—5, Gautreau—6, and Gautreau—7 for identification.)

By Mr. Brumfield:

Q. Will you take this photograph marked Gautreau—2, so that all the Jurors can see it, and tell the Jury what [fol. 32] this photograph shows?

A. This photograph shows the position of the body before it was moved, as it was found on the side of the road. That's on La.-1, which is on the west side of the road, heading in an eastward direction.

Q. And I will now show you the photograph marked Gautreau—1, and explain that to the Jury?

A. This is a similar photograph to the one that was just shown, which gives more of the area surrounding the body, also showing the shoulder of the road. It was taken in a similar direction.

Q. I will now go to photograph marked Gautreau—7?

A. This photograph was taken, that is, it was showing in the opposite direction, which the first one that was shown to you, it also shows the shoulder and some of the witnesses and investigating officers in the accident.

Q. They are shown in the photograph, is that what you mean?

A. Yes, shown in the photograph.

Q. I will show you photograph marked Gautreau—6, and please explain that photograph.

A. This photograph shows the lunch pail belonging to the deceased, and also the tire mark parallel to the road, and in the distance you can see the object that is covered, so this shows the area in which the body travelled after it [fol. 33] struck, shows the distance of the body.

Mr. Hughes: I object to that statement as being a conclusion of the witness.

The Court: The objection is sustained, and the Jury is instructed to disregard the testimony of the witness with

reference to the direction in which the body went after the accident.

Proceed.

By Mr. Brumfield:

Q. I show you the photograph marked Gautreau—5.

A. This is a floor mat of an automobile, which was put at this position in the photograph (indicating) to mark tire marks from the side of the road, between the floor mat, which is at the lower part of the picture, and the body which is covered. In the higher part of the picture you see the lunch pail. The purpose of that was to show marks traveling alongside of the road, which would indicate that an automobile—

Mr. Hughes: I object.

The Court: Sustained.

Proceed. Ask him another question.

[fol. 34] By Mr. Brumfield:

Q. I will show you the photograph marked Gautreau-3.

A. This photograph is an overall scene shot taken at a distance covering the road and the surrounding area on Louisiana State-1.

Q. And I show you the photograph marked Gautreau-6.

The Court: I believe you have already shown him Number 6.

By Mr. Brumfield:

Q. I show you Gautreau-4.

A. Photograph-4 is taken to show the grooves which were approximately five feet to the side of the road, in the grass. The body is in the background.

Mr. Brumfield: Thank you, sir.

The Court: You can pass the pictures around to the Jury, if you'd like.

Let's proceed with the next thing. Mr. Brumfield.

(Photographs shown to the Jury.)

By Mr. Brumfield:

Q. I show you six photographs, Mr. Gautreau, and ask you if you made these photographs and what are these photographs of? (Photographs to witness.)

A. These photographs were made by me. They are of an [fol. 35] automobile that was suspected—

The Court: Wait just a minute. Just say what it is.

The Witness: Well, showing—the pictures showed the damage to an automobile.

By Mr. Brumfield:

Q. And whose automobile?

A. The automobile belonged to Mr. Theriot.

Q. When did you make those photographs?

A. These photographs were made the evening of December 19th, 1955.

Q. That is the same day that you made the photographs of the scene?

A. Yes, sir.

Mr. Brumfield: I would like to offer and file in evidence these photographs marked Gautrau-8 through 13.

(Whereupon, the photographs above marked Gautreau 8 through 13 for identification received in evidence.)

By Mr. Brumfield:

Q. Mr. Gautreau, will you come and stand in front of the Jury and take these photographs and identify them with the numbers in whatever order you think best, and [fol. 36] explain them to the Jury.

Mr. Hughes: If the Court please, I think the photographs speak for themselves, and if the witness is instructed before he starts not to give any opinions or observations, since the photographs are obviously of something and they are there for the Jury to inspect.

The Court: May I see the photographs, please?

(Photographs to the Court.)

Mr. Hughes: I don't want to keep objecting.

The Court: Mr. Witness, suppose you just show the Jury the photographs and call attention to whatever indentations you want to call attention to, but just don't say anything about what caused the indentation, but just call attention to whatever there is in the picture that you want the attention called to.

The Witness: We will go now to Gautreau-12, which is a photograph taken of a head-on view of the automobile in question.

Then, Photograph Gautreau-10 is an angle shot, angle picture, taken to show the right-front and the right side of the vehicle in question.

[fol. 37] Photo-Gautreau-11 is taken from the side of the vehicle, showing the right-front fender, from the door area of the car, from the back to the front.

Photo Gautreau-9 is taken on an upward angle showing the right-front fender, and the right-front bumper of the vehicle in question.

Photo Gautreau-8 is the same picture, the only thing is that it is enlarged, to show the tire threads of the vehicle.

And, Gautreau-13, Number 13, is shown or is taken mainly for identification purposes in so far as the license plate on the vehicle is concerned.

(Photographs shown to the Jury.)

The Court: Proceed.

By Mr. Brumfield:

Q. Mr. Gautreau, on what side of the road was this body found, the body of Mr. Mercer?

A. It was found on the west side.

Q. With reference to the right or left?

A. Well, in an easterly direction it would be on the right side of the road.

Q. Is that the way towards the bridge?

A. Towards the bridge, yes.

Q. How long did you remain there on the Island after [fol. 38] you got there that morning and made these pictures?

A. On the immediate Island I remained until sometime around 12:30.

Q. Did any other officials or officers come down there while you were there?

A. There were some officials present on the Island when I arrived, the Island officials, and also the Deputy Sheriff who accompanied me to the Island.

Q. And who was in charge of making the investigation of this death?

A. The immediate death was in my charge, and the criminal action was in charge of Deputy Prudhomme.

Q. Did you identify this body as that of Byrd Mercer?

A. Yes, sir.

Q. And who had charge of the criminal investigation?

A. Deputy Sheriff Hubert Prudhomme.

Q. Did you accompany him while he interviewed any witnesses or any one else down there on the Island?

A. Yes, sir. We were together the majority of the time, but occasionally I would go off to do something else.

Q. Where did you make these pictures of this Theriot car?

A. The Theriot car pictures were taken in Golden Meadow that evening about 2:00 or 2:30.

Q. And why did you make the pictures of the Theriot car?

[fol. 39] A. The pictures were taken of that vehicle because of the damages to the car, and it was one of the prime suspects in the case.

Q. Where was this car located when you made the pictures?

A. The pictures were taken across the canal from the City Hall Building in Golden Meadow.

Q. Was the car parked at some place there? Where was it parked?

A. Yes, it was parked on the side of the road, almost directly opposite from the Court Building. They may be down the road a little further, but in the nearby vicinity.

Q. Now, Mr. Gautreau, were any scrapings or anything taken from this automobile which you photographed and identified as the Theriot car in your presence?

A. Deputy Prudhomme removed some scrapings from this vehicle and put them in a sealed envelope, to be brought to the laboratory for further examination.

Q. With reference to these scrapings, why were they taken, and what were they?

A. They were paint scrapings taken from various parts of the right side of the car, on the fender, and on the hood.

Q. And was anything else found on the car besides the scrapings that you just mentioned?

A. The car was placed on a rack, a grease rack, where [fol. 40] some hair particles were removed from beneath the automobile.

Q. And just where were these hair particles?

A. They were on the underneath section, I would imagine you would consider that as a crossarm.

Q. A crossarm?

A. Yes, sir.

Q. And on what side?

A. On the right-front side of the car.

Q. The right-front side?

A. Yes, sir.

Q. What was done with those scrapings?

A. They were also put in an envelope to be taken to the laboratory for examination.

Q. And who had those in their possession?

A. Deputy Prudhomme.

Q. Did you see Mr. Theriot there in Golden Meadow when you got there, when you were taking these pictures, and while this investigation, or interrogation was going on?

A. Yes, sir. I saw Mr. Theriot at the Police Headquarters after the pictures had been taken.

Q. What was his demeanor, or his attitude there when you saw him?

Mr. Hughes: I don't know whether the question is specific enough to—

[fol. 41] The Court: Are you objecting?

Mr. Hughes: I object.

The Court: I sustain the objection.

By Mr. Brumfield:

Q. Did you talk with Mr. Theriot yourself?

A. Mr. Prudhomme did most of the interrogation in so far as Mr. Theriot was concerned.

Q. Officer Prudhomme conducted the investigation there at Golden Meadow, I understand.

A. Yes, sir.

Q. Were the other officers there also?

A. The authorities from Golden Meadow were present, Deputy Duet was present at the time, and also a deputy whose name I don't recall.

Q. Was Deputy Millett there at the time?

A. Deputy Millett was there—he was an officer from Jefferson Parish.

Q. And State Trooper Folse was there, was he?

A. Trooper Folse, yes, he was present also.

Q. And Plaisance was an officer of the town?

A. Yes, Plaisance was an officer of Golden Meadow.

Q. Was he there?

[fol. 42] A. Yes, sir.

Q. And you said Duet?

A. Duet, Officer Duet, yes.

Q. What is he, an officer? Where is he located?

A. Golden Meadow.

Q. And that is in Lafourche Parish?

A. Yes, I think so.

Q. Now, how long did you stay there at Golden Meadow? How long was there an investigation going on, interrogation, under the charge of Officer Prudhomme?

A. Yes, it was under his charge.

Q. How long did that continue?

A. We were in Golden Meadow until approximately 8:00 or 8:30 that night.

Q. Now, Officer Gautreau, do you know what happened to this evidence? Do you know what happened to these scrapings that you identified and testified about, and these hair particles? Do you know what happened to them?

A. No, sir, I don't.

Q. Did you ever make inquiries as to what happened to this evidence?

A. No, sir, that was out of my department, as far as the evidence was concerned. This is filed by Deputy Prudhomme.

Q. You have no personal knowledge yourself as to what [fol. 43] happened to it?

A. No, sir, I don't.

Q. How many photographs have you taken of automobiles involved in collisions? Do you take many of those?

A. I have been taking photographs of automobiles involved in collisions since about 1950.

Q. And how many automobiles would you say you have photographed involving various types of collisions?

A. That is pretty hard to say, sir.

Q. Would it run into hundreds?

A. I would think that it would, yes.

Q. And you have your own equipment and your own dark room, and you print your own pictures?

A. Yes, I do all my own processing.

Q. Have you photographed cars before which have hit soft objects, like human beings, or animals?

A. Yes, I have.

Q. How many would you say that you have photographed?

A. In regard to automobiles that have hit soft objects, I would say I have handled about twelve different cases such as that.

Q. When an automobile hits a soft object is there a different indentation than that of a hard object, say two automobiles coming together?

A. Yes, sir.

[fol. 44] Mr. Hughes: I object to the competency of the witness to testify on that. That is a question of physics, I think.

The Court: What is the purpose? I will hear you on that.

Mr. Brumfield: This witness has photographed automobiles involved in situations where they come in contact with soft objects and he has also photographed them where they have come in contact with hard objects. I certainly think this witness is qualified to testify as to the type of indentation on this car, and whether it was made by a soft or a hard object, from that experience, may it please your Honor.

The Court: I think it is too speculative. I sustain the objection.

Let's proceed.

By Mr. Brumfield:

Q. After you were at Golden Meadow, and, of course, before that at Grand Isle, did you have any other contact with this particular case in your official capacity?

A. No, sir, I haven't.

Mr. Brumfield: I tender the witness.

Cross examination.

[fol. 45] By Mr. Hughes:

Q. About how far off the edge of the black top was the body?

A. The body was approximately two to three feet off the edge of the black top.

Q. From the pictures it appears that the grass was cut short at that point, is that correct?

A. Yes, sir.

Q. And the body was plainly visible from the road?

A. Yes, it was.

Q. Did you see Officer Duet down at Grand Isle—not Duet, I mean Folse, State Trooper Folse?

A. Yes, he came down to the Island.

Q. And he was down there a long while, while part of your investigation was going on?

A. Yes, sir.

Q. Now, Mr. Gautreau, when you went to Golden Meadow was Mr. Theriot's car concealed in any way, or was it out on the road somewhere?

A. It was not concealed in any way, no, sir.

Q. Did Mr. Theriot take you to a place where he said he had had an accident the day before?

A. As I recall, Deputy Prudhomme accompanied Mr. Theriot, along with some other officials.

Q. And you didn't go with them?

[fol. 46] A. I don't recall, sir.

Q. There were other suspects, other than Mr. Theriot were there not?

A. Not to my knowledge, no, sir.

Q. You said he was "one of the suspects?"

A. Well, it was just a term that I was using.

Q. And it had no other meaning? Now, were you present when the scrapings were taken?

A. Yes, sir.

Q. What color was the automobile?

A. The scrapings were taken from a cream section of the car.

Q. What was the color of the entire car?

A. Red and cream.

Q. But all the scrapings were from the cream section?

A. Yes, sir.

Q. Were you present when the car was put on the grease rack?

A. Yes, I was.

Q. I think you testified some hair was taken from under the car?

A. Yes, there were some fibrous objects.

Q. I was just going to ask you, Mr. Gautreau, if you would swear it was hair?

A. Well, that was the purpose of taking them to the [fol. 47] laboratory, for examination, to prove whether it was hair or not.

Q. So you did not know whether it was hair or not?

A. No, sir.

Q. Could it have been a type of weed?

A. It could have been a weed, or animal hair, fur.

Q. Could it have been a string or thread?

A. It is possible, sir.

Q. From your observation of the automobile when it was on the grease rack, did it look like the car was greased regularly?

A. I did not observe that, sir.

Mr. Hughes: No further questions.

The Court: May this witness be excused?

Mr. Brumfield: He may be excused in so far as I'm concerned.

Mr. Hughes: Yes, sir.

Mr. Brumfield: I would now like to call Mr. Theriot on cross-examination.

PARIS THERIOT called as a witness at the instance of the [fol. 48] Plaintiff, under cross-examination, having been duly sworn was examined and testified as follows:

Cross examination.

By Mr. Brumfield:

Q. Are you Mr. Paris Theriot?
A. Yes, sir.
Q. Did I pronounce your name correctly?
A. Paris Theriot.
Q. How old are you, Mr. Theriot?
A. Fifty-three.
Q. Where do you live?
A. Between Golden Meadow and Grand Isle.
Q. Just exactly where?
A. Well, I've got a home in Grand Isle.
Q. How far from Golden Meadow?
A. In Grand Isle.
Q. Just where do you live?
A. I live in Golden Meadow and I live in Grand Isle. I've got two homes.
Q. Where do you live most of the time?
A. Most of the time I live in Grand Isle.
Q. Where does your wife live?
A. She lives with me.
Q. How often do you stay in Grand Isle, say, taking a year's time, how much time is it in Grand Isle and how much [fol. 49] time is it in Golden Meadow?
A. I spend—I can figure about on seven or eight months a year in Grand Island right now.
Q. You say seven or eight months a year in Grand Isle? Is that right?
A. Yes, sir.
Q. In December of 1955, where were you living?
A. I was living in Golden Meadow at that time.
Q. Now, Mr. Theriot, were you down at Grand Isle on Sunday, December 18th, 1955?
A. Yes, sir.
Q. When did you first go there?

A. It was around between 1:00 and 2:00 o'clock, something like that.

Q. Between 1:00 and 2:00 o'clock?

A. Yes, sir.

Q. Did you go down there alone?

A. Yes, sir.

Q. What kind of car were you driving?

A. I've got an Oldsmobile.

Q. What model?

A. That was a '56.

Q. What color was it?

A. Red and white. The front was white and the back was red, two-tone color.

[fol. 50] Q. Two-tone?

A. Yes, sir.

Q. And were you alone when you went down there?

A. Yes, sir.

Q. These photographs that were made by Mr. Gautreau, I think you have seen those photographs?

A. No, I didn't see no photographs. I didn't know they had any.

Q. I'll show them to you. I am sorry. I thought you had seen them.

I will show you photograph Gautreau—13, 9, 10, 11 and 12, and ask you if those are photographs of your car? Are these photographs of your car? (Photographs to witness.)

A. That is an Oldsmobile, and it looks like mine.

Q. Find the photograph where it has a license number on there and see if you can recognize it?

A. That is one thing that I don't know right now, my license number.

Q. This License Number 530826 here, you wouldn't deny that those are photographs of your car, would you, Mr. Theriot?

A. No, I don't deny, because that is an Oldsmobile.

Q. Who owned this automobile, sir?

A. Sir?

Q. Who owned the automobile?

[fol. 51] A. Well, that is a demonstrator that we had at the garage.

Q. Did you own it or did someone else own it?

A. Well, it was part of the garage, the owner of the garage.

Q. Who owned the garage?

A. That was between me and my brother, Leo.

Q. And that is Leo Theriot?

A. Yes, sir.

Q. That is your brother?

A. Yes, sir.

Q. And you and Mr. Theriot, Leo Theriot were partners?

A. Yes, we were partners, but I sold him—I sold it to him.

Q. You sold him the business?

A. Yes, sir.

Q. You sold him the business effective December 31st, 1955, didn't you?

A. A good bit before that.

Q. But it was effective December 31st, 1955, wasn't it?

A. I don't know exactly what the papers was on that.

Q. You know, as a matter of fact, it was, don't you Mr. Theriot? Do you deny that you sold him your business, your interest in that business effective December 31st, 1955?

A. I don't know when it took place. I told you I don't remember.

[fol. 52] Q. What kind of business was it?

A. Oldsmobile and Chevrolet business. Automobile business.

Q. You say Oldsmobile and Chevrolet?

A. Yes, sir.

Q. Did you sell him or anyone else any other of your businesses?

A. No, that was the only business that we had together. That was the only business we had together.

Q. You are in the boat or shipping and towing business, aren't you?

A. No, my son has that.

Q. Don't you have an interest in it?

A. I've got a little interest. I'll say that I've got a little interest.

Q. As a matter of fact, you've got a thousand dollars a month just from that, don't you?

A. They gave me a thousand dollars a month, yes.

Q. Do you do any work for that?

A. Yes, take care of the boats, look around.

Q. What is your son's name?

A. Noel Theriot.

Q. How long has he been in business with you in the boat business?

A. I don't recall. We were in the shrimp business before and he started that tugboat business—I don't recall how [fol. 53] long, about, I would say around four years, but that is his business. That is not mine.

Q. But do you get a thousand dollars a month from that business or not?

A. They give me that to support myself.

Q. Who is "they"?

A. I say that he give it to me.

Q. He gives it to you?

A. Yes, I've got to make a living.

Q. How much did you get for your Chevrolet-Oldsmobile business when you sold it?

A. I don't recall exactly.

Q. You don't remember how much you got for it?

A. Yes, my share was sixty somewhat thousand. I'm supposed to get that, yes.

Q. You haven't got it yet?

A. No, not yet. My brother doesn't have the money.

Q. How is that?

A. My brother doesn't have the money to pay me cash.

Q. He doesn't have the money to pay you cash?

A. Yes.

Q. Did he give you a note?

A. Yes.

Q. Where is that note?

A. It must be at the office over there.

[fol. 54] Q. What office?

A. Over there in Golden Meadow.

Q. Is it your office or his office? Where is the note that he gave you?

A. Well, he has the license to—

Q. Just answer the question first, and then you can explain all you want to, Mr. Theriot.

A. It must be at his office, or at my son's office.

Q. You don't know where the note is yourself?

A. My son takes care of my business, not me. My son runs the business.

Q. Now, why did you go down to Grand Isle that day?

A. I went to see Mr. Terrebonne.

Q. What Terrebonne?

A. Leo Terrebonne.

Q. Why did you go to see him?

A. About selling him a car.

Q. Did you sell him a car?

A. Yes, I made the deal for it.

Q. You say Leo Terrebonne? You still had your interest in your automobile business at that time, didn't you?

A. Well, I was working at that time—I was working till last year, selling cars like that.

Q. And you still owned half of it, didn't you?

A. No, I sold it to my brother, I told you.

[fol. 55] Q. How did you get paid for selling the car? How did you get paid for that?

A. "How"? You mean how I got paid?

Q. Yes, did you get any commission, or did you get any salary, or how did you get paid for selling the car?

A. I don't charge him nothing. I done that on my spare time—that's my brother.

Q. You done it on your spare time, but this title wasn't going to take place until December 31st, 1955, when you sold it to your brother, isn't that right?

A. How you mean?

Q. When you sold your business to your brother, it was to be effective at the end of the year, December 31st, 1955?

A. Yes.

Q. Isn't that right?

A. Yes. You know, they handled all that, and that is what you say takes place in '55?

Q. I am asking you?

A. Well, I don't know what the figures, the papers are—he figured the papers and he give it to me, and I signed, and that's all. I didn't even read what he puts down on it. I trust him.

Q. I see.

Now, how long did you stay down there at Grand Isle?

A. Well, I went over there around between 1:00 and 2:00 [fol. 56] and I left around 7:45, something like that. I don't know. I don't have no watch. I didn't check no time.

Q. When you were down there you spent all that time in the Fisherman's Bar, didn't you?

A. No.

Q. How much did you spend in the Fisherman's Bar?

A. I don't know. I don't keep no record of how much time I spend in one place.

Q. Where else did you go?

A. I went in the restaurant and drank some coffee, and I went over on the wharf to look at the fishermen coming in, and I went in the bar.

Q. What kind of whiskey were you drinking?

A. Well, I drink some Scotch, when I drink.

Q. When you were drinking that evening?

A. Yes, I drank between four and five drinks, something like that.

Q. Between four and five?

A. Yes.

Q. Where did you drink?

A. Where I drink?

Q. Yes, where?

A. At the bar.

Q. What bar?

A. That Fisherman's Bar.

Q. At the Fisherman's Bar?

[fol. 57] A. Yes, sir.

Q. Who owns the Fisherman's Bar?

A. Terrebonne and Adams.

Q. You say Terrebonne and Adams?

A. Yes.

Q. Who did you sell the car to?

A. I sold to Terrebonne.

Q. The man that is part owner of the bar?

A. Yes.

Q. Where did you consummate this sale? Where was the deal closed there in the bar?

A. Between the bar and his office.

Q. Who paid for these drinks that you bought?

A. I paid for the drinks.

Q. Where were you sitting there in the bar?

A. I was sitting right behind the bar, in the front (indicating with hands.)

Q. What you do, you just put a twenty dollar bill on the counter, is that correct and—

A. Well, usually, what we do, we put a ten or a twenty and buy drinks for the ones that want it.

Q. Did anyone buy you a drink when you were down there?

A. Maybe the bartender bought one. I don't recall. That's two years ago, you know.

Q. You didn't drink anything else but Scotch? You didn't [fol. 58] drink a little Bourbon, or anything like that?

A. No, I don't drink Bourbon.

Q. You are a Scotch man?

A. Scotch and water, that's all I drink.

Q. Who else did you see there in that bar when you were sitting in there?

A. I saw plenty of people around there.

Q. Name me some of them.

A. That was two years ago, you know. I saw Mr. & Mrs. Fink. They were there.

Q. Did you have a drink with them?

A. They came right after me. I bought the drinks. I was in there. I bought a round of drinks. I put a twenty dollar bill on the bar, and they came in and I asked them if they want a drink. Mrs. Fink took a glass of water, and Mr. Fink took a coke, or root beer, a soft drink.

Q. They took a drink with you?

A. No, no, sir.

Q. But you had a drink when they were there?

A. Yes.

Q. Who else did you see in there?

A. Well, I seen the bartender—the bar was full of people you know.

Q. What was the bartender's name?

A. It was Adams and a fellow by the name of Joe.

Q. Is that Red Bradberry?

[fol. 59] A. I believe it is Bradberry—we call him Joe.

Q. Did you see anyone else in the bar?

A. I saw plenty in there.

Q. Can you identify, or are you able, Mr. Theriot, to give us the names?

A. Like I tell you, it's two years ago, and I don't remember what I saw. I didn't know that this thing was coming up like that, and I couldn't check up nothing. When you expect something to come up, you're going to go over there and check.

Q. But you remember Mr. & Mrs. Fink, and you don't remember anyone else?

A. No.

Q. Do you remember a red-headed nurse being in there?

A. No.

Q. Did you ever see a red-headed nurse that day?

A. Not that I know of. I might see her, but I don't remember seeing no nurse.

Q. Did you have a red-headed nurse in your car at any time that day?

A. No, sir.

Q. Do you know, or do you say you don't remember?

A. I know. Nobody was in my car. I told you that.

Q. Do you know whether or not you talked with a red-headed nurse?

[fol. 60] A. I don't know, I talked to plenty of people.

Q. Well, do you know whether you did or not, Mr. Theriot?

A. What's that?

Q. That you saw and talked with a red-headed nurse that afternoon?

A. I don't know, I tell you. I don't know if I talked to a nurse or not. That's two years ago. I don't remember two years ago who I talked to.

Q. You don't remember? Is that what you are saying?

A. I know she didn't ride with me in my car. I am a married man.

Q. No one was in the car with you?

A. No one.

Q. You are positive of that?

A. Yes, I know that.

Q. What time was it when you made the deal with Mr. Terrebonne about your car?

A. During the afternoon.

Q. Was it late afternoon, mid-afternoon, or —

A. I didn't check it out, I'm telling you. I'm telling you the truth, I don't know what time I closed the deal. It was between when I got in there and when I left.

Q. After you left the Fisherman's Bar—did you leave the Fisherman's Bar and then you started towards [fol. 61] Golden Meadow, going home?

A. Yes.

Q. You left the Fisherman's Bar?

A. Yes.

Q. You are positive of that?

A. Yes.

Q. And you say it was around 7:30 or 7:45?

A. Sometime like that, yes.

Q. And that is—that night, that evening, or afternoon, is that right?

A. Yes.

Q. Which direction were you headed when you left?

A. I was going to Golden Meadow.

Q. Along Highway Number 1?

A. I don't know the number of the highway—that is the only one from Grand Island to Golden Meadow.

Q. That is the only highway there?

A. Yes. You can't get lost.

Q. You were going from Grand Isle to Golden Meadow?

A. Yes.

Q. Now, Mr. Theriot, do you remember feeling any bump or any jar of any kind on your car from the time you left the Fisherman's Bar, while you were driving along there on Grand Isle?

A. No, sir.

[fol. 62] Q. You don't remember?

A. I didn't hit nothing.

Q. You say you didn't hit nothing?

A. No, sir.

Q. Were you drinking?

A. No, I wasn't drunk.

Q. Were you feeling your whiskey?

A. No. You can't feel no four or five drinks in all afternoon. You know that yourself. You can't feel it.

Q. Well, how much did it take you to make you feel it?

A. I don't know.

Q. Do you feel ten?

A. I tell you I don't know. You might drink two and you're going to be drunk, or maybe it takes more.

Q. Well, I'm talking about how much it takes to make you feel it?

A. I don't know. I never did try it. I never did pay no attention to how much drinks I drink to feel it.

Q. You never have felt the whiskey you drank?

A. How's that?

Q. You say that you have never had any reaction or feeling from intoxicating liquor or the Scotch that you drink?

A. Well, I tell you, anytime that you're going to go in a party somewhere, you're going to drink, and you're going to feel it if you drink enough.

[fol. 63] Q. Therefore, you have felt—

A. You ve got to, if I am at a party, you might feel it. You're going to do it—anybody does it when they're drinking.

Q. But it's your testimony that you didn't feel it that day?

A. No, not that day.

Q. Where did you eat lunch that day?

A. Home, Golden Meadow.

Q. What time?

A. About 11:30.

Q. 11:30?

A. Yes.

Q. You didn't eat anything during that afternoon, did you?

A. No, I drank coffee, and I eat some peanuts.

Q. Where did you eat the peanuts?

A. Over there at the bar.

Q. Mr. Theriot, was it raining when you left the Fisherman's Bar?

A. No, it was drizzling a little bit, but not too much.

Q. It was drizzling?

A. Yes.

Q. Did you have your windshield wiper on?

[fol. 64] A. Yes. It was a new car, and you have to have it on.

Q. You didn't understand my question.

A. Well, it's a new car and it's working all the time when it is new.

Q. Well, my question is were they operating?

A. Oh, yes.

Q. Did you have to have the windshield wiper on? Did you have it on?

A. Yes, I had it on.

Q. And I assume that your lights were working on your car?

A. Yes, they were working.

Q. Did you stop anywhere from the time you left Fisherman's Bar up until the time you got home?

A. No, I come right straight home.

Q. You didn't stop anywhere and buy any cigars?

A. No.

Q. You are positive about that?

A. Yes.

Q. Have you ever been in Harry's Bar there in Grand Isle?

A. Harry's Bar?

Q. Harry Duplantier?

A. Oh, sometimes, yes, a long time ago.

Q. I asked you, Mr. Theriot, whether or not you stopped [fol. 65] at Harry's Bar after you stopped at Fisherman's Bar, after you left the Fisherman's Bar?

A. You mean that day?

Q. That night?

A. No.

Q. You are positive of that?

A. Yes.

Q. You will swear to that?

A. Yes.

Q. And you do swear to that?

A. Yes, I swear to it.

Q. You didn't stop anywhere from the time you left Fisherman's Bar until the time that you got to your house at Golden Meadow, is that your testimony?

A. Yes.
Q. What time did you get home that night?
A. I got there at 8:30, something like that.
Q. About 8:30?
A. Yes.
Q. Did you eat dinner or supper that night?
A. No, I didn't eat nothing.
Q. You didn't eat nothing?
A. Sometimes I eat at night and sometimes I don't eat. I'm too fat already.
Q. Did you have anything further to drink that night?
[fol. 66] A. No.
Q. I mean at home?
A. I don't drink at home except if you come there and you want a drink, I might take a drink with you. I don't drink by myself.
Q. The next morning what time did you get up?
A. I get up every morning around 6:00 o'clock, 5:30 or 6:00.
Q. Where did you go that morning, Monday morning, the 19th?
A. I went on the outside of the bayou where my son builds some boats, by the shipyard.
Q. Did you take your car with you, the same car that you were in that night before?
A. Yes.
Q. Did you ever have anything done to that car that morning, washed, greased, cleaned out, swept, or anything?
A. No.
Q. Are you positive about that?
A. Yes.
Q. Do you specifically deny that you had your car washed that morning, Monday morning, December 19th, 1955?
A. Yes, I can swear to that because I've got proof of that.
Q. What kind of proof have you got?
[fol. 67] A. That is the only day my car didn't get washed in the last two years.
Q. What kind of proof?
A. I used to get my car washed every morning. This man that was working for me, he used to wash my car every

morning, and that morning I left too early and he didn't wash it. That is the only day my car didn't get washed.

Q. That is the only day of all the mornings you got up that your car never was washed? Is that what you are saying?

A. That day he wasn't on the job yet—he was washing it everyday except when he was sick.

Q. What was the man's name?

A. Terrebonne, from Golden Meadow.

Q. What is his name?

A. Morris.

Q. Morris?

A. Yes.

Q. Is that Maurice or Morris?

A. Morris Terrebonne.

Q. Is he kin to Mr. Leo Terrebonne, the man you sold the car to?

A. I don't know. I don't believe. I don't believe that he is kin—I can't tell you.

Q. Where does Mr. Morris Terrebonne work?

A. He was working at the garage, cleaning out the place. [fol. 68] Q. And it is your testimony that he washed your car every morning of the world except this morning, December 19th, 1955? Is that your testimony?

A. What was that?

Q. That Mr. Morris Terrebonne washed your car every morning except December 19th, 1955?

A. He was supposed to wash it every morning. I was there to check him up and he was supposed to wash that car every morning. But I wasn't there each morning to check up if he washed them or not. If that car was cleaned that day before, I didn't use to—

Q. Well, how do you know that it was not cleaned and washed that morning?

A. That morning it was dirty. It was dirty that morning and I didn't have no time to wait for him to wash it.

Q. Have you ever left your house at 6:00 o'clock before?

A. Plenty of time I leave home at 6:00 o'clock.

Q. What time do you usually leave?

A. Anytime between 5:30 and 7:00.

Q. Before you left Mr. Terrebonne washes your car, usually?

A. If my wife's car is clean, I take my wife's car and he washes mine.

Q. Was your wife's car clean on that morning, Monday [fol. 69] morning, or not?

A. Listen, that's two years ago. I can't tell you.

Q. But you can tell me that if it had been clean, you would have taken it?

A. I would have if I wanted to get mine washed. If I had wanted to have my car washed, yes, I take my wife's car, you see.

Q. So then you didn't want yours washed?

A. Then, you see, I had no idea because it was no use to have it washed—the road was dirty, and there was no use to get the car washed when it was dirty out too, you see.

Q. But if you had wanted to get your car washed, you would have taken your wife's car? Is that what you are saying?

A. Yes.

Q. So you took your own car?

A. Yes, I didn't have no idea to get my car washed.

Q. You had no idea to get it washed? You didn't, you didn't have it washed?

A. Yes.

Q. And you deny that you had it swept out and cleaned?

A. Yes.

Q. Where did you go that morning in your car?

A. I went to the shipyard.

Q. How far is the shipyard from your house?

[fol. 70] A. About two miles.

Q. About two miles?

A. Yes. I went out to the bayou after that, around there, by another shipyard, on the other side of the bayou.

Q. You've got another shipyard there?

A. That was where my friend had his boat to be fixed. I went over there.

Q. Where else did you go with your car that Monday morning?

A. I tell you I don't know. That's two years ago. I can't remember two years ago where you go that day. You don't remember what you do.

Q. Mr. Theriot, will you kindly answer my question?

A. I answered.

Q. Did you move your car from the point where you left it there at the shipyard, where your son was building ships, after you brought it there?

A. Yes, I moved it.

Q. Where did you take it?

A. On the other side of the bayou, like I tell you.

Q. Where did you go over there?

A. I go over there with Mr. Fink, who was having his boat fixed.

Q. You say you went over there to where Mr. Fink had his boat fixed?

[fol. 71] A. He wasn't there, so I came back to my shipyard.

Q. You didn't go anywhere else but—how far is this, where you went to the other shipyard?

A. You have to go about, I would say about three miles, and you cross the bayou, and come back about two and a half miles.

Q. You cross the bayou on the bridge?

A. Yes.

Q. Was it raining Monday morning or not?

A. I don't believe it was. I couldn't tell you exactly.

Q. But you didn't stay over there at the other shipyard?

A. I came right back. I went over there and came back.

Q. Did you take your car and leave it anywhere else after that?

A. No, I left my car there, and I went over to ask Mr. & Mrs. Fink if they'd pick me up to go on their boat over there.

Q. And you left your car there at the shipyard?

A. Yes.

Q. And did you ever move it after that?

A. No.

Q. Were you there when the officers came to look at your car?

A. No.

[fol. 72] Q. Where were you?

A. I was over there with Mr. Fink. I was over there by his boat.

Q. Did they send for you or did you come over?

A. No, they didn't send. When I came back they were there.

Q. Did they ask you about this accident that occurred down there on Grand Isle, where Mr. Mercer was killed?

A. No, they asked me like that—they asked me where I wrecked my car. That is what they asked me.

Q. They asked you where you wrecked your car?

A. I said why do you ask me that? That's what they told me.

Q. Who was that that you were talking to at that time?

A. I don't recall—there were three or four men there, you see.

Q. Name me one of them?

A. I can't remember two years ago which one talked. They were all talking.

Q. How many were there then?

A. There were two deputies from Jefferson, and they had Folse, a State Trooper.

Q. What did you tell these officers then when they asked you how did you wreck your car? What did you tell them?

A. I told him I wrecked it the Sunday before, up the [fol. 73] bayou about six or seven miles from Golden Meadow.

Q. How did you tell him you wrecked it?

A. I told him that I was going up the bayou and I was looking for a piece of land that I wanted, I was looking for a lot to buy.

Q. You wanted to buy a lot?

A. Yes, and as the truck was going in front of me, I noticed that the truck was a little close and I tried to pass him, you see, and I hit the back of the truck with my right side of the car.

Q. What time did this happen?

A. That happened right after 12:00, about 12:15, something like that.

Q. About 12:15?

A. Yes.

Q. And you're talking about the Sunday which was just before the Monday that these officers talked to you? Is that what you are saying?

A. Yes.

Q. What time was it when the officers were talking to you? What time of the morning was it?

A. When they were talking to me, that was in the afternoon.

Q. It was in the afternoon?

A. Yes, sir.

[fol. 74] Q. And you had already had your lunch?

A. That day, yes.

Q. Where did you eat lunch that day?

A. At my house.

Q. And you told them that you'd had this wreck with this car or truck?

A. Yes.

Q. Is that what you are saying?

A. Yes.

Q. What kind of truck?

A. It was a 1-ton, stake body.

Q. What was the color of the stake body?

A. Well, I'll tell you, I was in the back of the truck, and I didn't see the color of the truck.

Q. What side of the road was it on?

A. On the right side, and I was on the right side.

Q. Were there any other cars coming in the opposite direction toward you at that time?

A. No, sir.

Q. Were there any behind you at that time?

A. I didn't see nobody in the back of me.

Q. How did you come to hit it?

A. I just told you, I just finished telling you. I wanted to tell you that but you—

Q. Well, I will give you all the time you want and not [fol. 75] interrupt you at all, and just tell me, and tell this Jury how you hit that truck.

A. I just told you that I was coming, that I was going up the bayou, and I was looking aside when I noticed the truck in front. I tried to pass him on the side, and when I tried to pass him he pulled a little bit on the left, and I hit him right in the back, the piece underneath of the truck body, the body of the truck—it is a 2 or 3x10, or 3x12 sticking out, two pieces like that (indicating with hands), and you've got the body of your truck right on that, and I hit the

back part with the top of my headlight, in front. I put my brakes on, and when I saw it, I put the brakes on and I slid on the road and I go off of the road, and I came back slowly, and I just make it. I came back slowly on top, on the road there, and it was gone, I guess, off, and I looked at my car and I saw that it was not too much, and I looked in the back over there and I saw a piece of wood about that long, 26 or 30 inches (indicating with hands) long, and maybe a 6x6 or 6x8, and I threw it on the side of the road, and I turned back and I went right straight to Grand Isle. That's exactly the way that happened.

Q. All right.

Now, Mr. Theriot, you say that the right headlamp of your car hit the left back part of this stake body truck you described, and what was the end of that? Was it the board [fol. 76] that supported the truck?

A. That is not a board—that's a 3x10 or 3x12, on an angle like that (indicating with hands.)

Q. And that is what supports the—

A. That is what supports the floor of your truck.

Q. The floor of the truck?

A. Yes.

Q. Was this a wood or iron truck?

A. Well, the stake body, sometimes you've got wood and you've got a little iron all around, sometimes.

Q. Well, what type was it?

A. The truck didn't stop—he kept on going. I couldn't check up on it.

Q. So you don't know whether it was wood or iron, or what it was?

A. It was wood, wood body, and maybe it had iron all around. Some got the iron and some don't have it, so I couldn't lie to you on that.

Q. And you don't know what color it was?

A. It was some kind of dark color—I don't know what color it was. I just saw the back.

Q. You would know whether it was just plain wood, or whether it was painted, or whether it was iron, wouldn't you?

A. You can't tell in the back of the truck that way.

Q. You can't tell?

[fol. 77] A. It was an open truck, and in the back, you can't tell.

Q. Did the truck have a cab on it, or just an open truck.

A. I told you that it had a cab and a stake body, and of course the cab, and he had all that junk.

Q. Did you cause the truck to be knocked to the side or to deviate from the path it was going?

A. A little bit. When I hit him, I just moved it a little bit, but he stayed on the road. He didn't stop. He just kept on going.

Q. Did you blow your horn when you went to pass him?

A. Yes, I blew my horn. I don't believe he heard me.

Q. Why do you say you don't believe he heard you?

A. Because he got a little bit on my side of the road.

Q. And then what happened to your car? After you hit him, you said that you hit the truck?

A. I got off the road maybe one hundred or one hundred and fifty to two-hundred feet, and I came back on the highway.

Q. How much did you get off the road?

A. I got completely off, the four wheels went off.

Q. Was it muddy, or was it grass, or was it damp?

A. No, they had grass in there. It was a little muddy but not enough to stay stuck. The passway there was freshly mowed—

Q. But they had grass?

A. They had some grass.

[fol. 78] Q. Did your car get stuck?

A. No, I just made it up there.

Q. So it's your testimony then that you didn't run over to the left side of that road and get stuck?

A. No, I didn't get stuck.

Q. Is that what you are saying, that you didn't get stuck?

A. I didn't get stuck.

Q. You didn't have to be pulled out?

A. No, sir.

Q. Mr. Theriot, do you deny that you told one of the officers, or all of them, or any one of them, when they were interrogating you, that you could prove that you had the wreck because you could name the man that pulled you out of that road?

A. I didn't tell that to nobody.

Q. Do you deny that?

A. Yes, because they asked me who pulled me out. I said "I pulled out myself. Nobody didn't pull me out."

Q. You didn't say, "I can prove to you that I was there because I can name the man that pulled me out"?

A. No, sir.

Q. You didn't say that?

A. No, sir.

Q. Mr. Theriot, on Sunday, December 19th, 1955, when you were asked by these officers—

[fol. 79] A. On Sunday I didn't see them.

Q. I mean Monday.

A. I didn't see any on Sunday.

Q. On Monday, December 19th, 1955, do you deny, when you were first asked how you wrecked your automobile, that you told these officers, and a man named Guidry, who was an ex-deputy sheriff present at that time, and an officer named Douglas Millett, who was present at that time, being two of the officers present, didn't you tell these officers that you had hit a cow or an animal the day preceding?

A. Yes, I deny that because they wasn't there.

Q. Answer my question, did you tell them that?

A. No, they wasn't there then. They wasn't there when the officers asked me where I wrecked my car. Millett and Guidry wasn't there. They came late that night.

Q. You deny telling Mr. Guidry and Officer Millett, when they asked you how you wrecked your car, that you told them that you had run into an animal or a cow?

A. Yes, I deny that.

Q. You deny that?

A. Yes. I didn't see them that day. They came late that night.

Q. You are positive of that?

A. Yes, sir.

Q. Are you saying that Mr. Millett and Mr. Guidry weren't even there?

[fol. 80] A. Not that day, no, sir. They came late that night.

Q. They weren't there Sunday afternoon?

A. I didn't see them Sunday afternoon.

Q. I'm sorry. I mean Monday afternoon?

A. No, I didn't see them—they came late.

Q. What time did they come?

A. They came when they were at the Town Hall. I don't know what time it was when they asked me about that. That wasn't on the outside of the bayou by the shipyard.

Q. But you deny that you told them that you hit an animal or a cow?

A. Yes, I deny that. I didn't have to tell them nothing.

Q. Mr. Theriot, how long were you interrogated, or how long were you questioned on this Monday, December 19th, 1955?

A. I don't know. They came in the afternoon and they left around—I don't know what time it was, but between 8:00 and 9:00 o'clock, and they were asking or questioning the witnesses they called in there. I was there in the back, in the Town Hall, sitting down, and we were talking.

Q. And they questioned you?

A. They questioned me a while. They questioned me on the other side of the bayou. They didn't spend all that time with me there.

Q. Who else did they question?

A. I don't know. They were in the front office of the [fol. 81] Town Hall. I don't know who they called in. I was in the back.

Q. Did you get this car repaired?

A. Yes, I got it repaired when they gave me orders to have it repaired.

Q. Do you remember how much the repair bill was?

A. I don't have nothing to do with that.

Q. Why don't you have nothing to do with that?

A. Because they take care of that at the garage.

Q. That was done at the garage?

A. Yes.

Q. You had public liability insurance with the Hartford Accident & Indemnity Company on this car, didn't you?

A. I'm supposed to have, but since my brother takes care of that, I don't know what kind of insurance he's got. I trust him to do everything for me, him and my son, and the only thing I do is to sign papers, and that's all.

Q. All you do is sign the papers?
A. Yes.

Mr. Brumfield: I believe that is all at this time, Mr. Theriot.

The Court: We will recess now until 1:30.

(Whereupon, Court recessed until 1:30 o'clock P.M.)

AFTERNOON SESSION

Proceedings

[fol. 82] The Court: Proceed. Call your witness.
Mr. Brumfield: Call Officer Prudhomme.

HUBERT LOUIS PRUDHOMME, called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Mr. Prudhomme, will you give your full name, and speak loud so that the Jury and his Honor and this gentleman over here can hear you.
A. Hubert Louis Prudhomme.
Q. Where do you live?
A. I live in Metairie, Louisiana, 3825 Beauvais.
Q. What do you do for a living? What is your occupation?
A. Deputy Sheriff for the Parish of Jefferson.
Q. How long have you been a deputy sheriff?
A. Approximately nine years.
Q. How old are you?
A. I'm thirty-two.
Q. Officer Prudhomme, and, do I pronounce your name correctly?
A. Yes, Prudhomme.
Q. On December 19th, 1955, which was a Monday, did [fol. 83] you receive a call with reference to an accident in which a man by the name of Mercer was killed on Grand Isle?

A. I did, yes.

Q. Do you recall from whom this call came?

A. Yes, it came from the desk sergeant at the East Bank Jail, which is located in Metairie.

Q. Where were you at that time?

A. I was at home in bed.

Q. And do you recall about when that was?

A. I would say that it was around 7:00 o'clock in the morning.

Q. In the morning?

A. Yes, sir.

Q. So that would be Monday morning, the 19th of December?

A. Yes, sir.

Q. And what did you do after you received the call?

A. Well, I had orders from the desk sergeant that he had gotten from Chief Deputy Stewart to come to the East Bank and procure a Parish Police vehicle and pick up a Deputy Gautreau, who was assigned to the Coroner's Office, and proceed to Grand Isle.

Q. And do you recall approximately the hour that you arrived on Grand Isle?

A. I would say sometime between 9:30 and 11:00—around 10:00, 10:30, something like that.

[fol. 84] Q. And when you got there, will you describe to the Jury just what you saw there on this road, this situs of this accident?

A. Well, we inquired as to where the accident had occurred, and it was pointed out to us that it was at the farthest end of the Island.

When we arrived at the scene, there was quite a few people there, quite a few automobiles, and one of the deputies that lived on the Island, known as Benny, was on the scene, and he was trying to preserve the evidence that was there. So, Gautreau and myself proceeded to investigate what we were supposed to do. We took measurements, and so forth, pictures.

Q. Did Officer Gautreau make some pictures?

A. Yes, he did. Quite a few of them.

Q. You have seen those pictures, have you not?

A. Yes, sir, I have.

Q. And would you describe, if you will, sir, where the body of Mercer was when you saw it?

A. Well, upon approaching the far end of the Island, the body was on the left side of the road. It was off the pavement, and the—

Q. If you were headed east, going away from the Island, what side would it be on?

A. It would be on the right side. The right side.

Q. Did you see any tire marks there near his body?

[fol. 85] A. Yes, there were some marks that ran off the road for quite a way.

Q. What was the position of this body with reference to these tire marks?

A. It would be right next to the tire marks.

Q. And did you see any other evidence of any kind?

A. Yes, there was quite a few pieces of clothing. There was a lunch pail, and a cap. Like I say, there was a few—there was a coat, I believe, and a few other things.

Q. What was Mr. Mercer wearing? What type of clothing?

A. Well, these little blue denim work clothes.

Q. Overalls, you would call it?

A. Yes.

Q. Blue denim?

A. Yes. I believe that's what they call them.

Q. And after you viewed the body and this evidence, did you take this evidence, the necessary articles in your custody?

A. I did, sir. We had some paper containers, I believe, and we put them in the paper container.

Q. Did you or Officer Gautreau, or together, make an identification as to this body?

A. Yes, we did.

Q. And did you determine it was Mr. Mercer?

A. Yes, sir.

Q. Now, how long did you stay there on the Island at that time?

[fol. 86] A. You mean that complete Island or—

Q. At the site?

A. Well, at the site, I would say around an hour, hour and a half.

Q. Was the body then removed? Was an ambulance called?

A. Yes, after we completed our investigation and took all the evidence off the scene, we told this deputy from the Island, and his last name is Verdine, I believe, to go ahead and have the body removed.

Q. And it was removed?

A. Yes, sir.

Q. Do you know where it was taken, the body?

A. No, sir, I am not sure. I really don't know. Gautreau handled that because that was the Coroner's business.

Q. And did you say that you were at that place approximately an hour, hour and a half? Did I understand you correctly?

A. Yes.

Q. And then where did you go?

A. From there we went on into Golden Meadow.

Q. At the time that you were there at the site of the accident, you first got there and when the pictures were being made, what other officers came there and investigated, besides this Verdine that you mentioned?

A. A State Trooper came upon the scene.

[fol. 87] Q. Was his name Jesse Folse?

A. Yes, sir.

Q. When did he get there?

A. Well we were about completed with our investigation when he arrived.

Q. And did you interrogate anyone or did you leave that situs and go anywhere else on the Island before you left?

A. Like I said, there was a few persons around the scene, and we inquired if anyone had seen or heard anything pertaining to the accident, and no one actually was a witness to it.

Q. Did you learn there that Mr. Paris Theriot had been there?

A. Yes, someone in the crowd mentioned it.

The Court: Just a minute please. I think you had better take the witness and keep him off of evidence which is inadmissible. That is hearsay.

Let's proceed.

By Mr. Brumfield:

Q. Don't say what anyone told you.

I made the inquiry or I questioned you did you ascertain whether or not Mr. Theriot had been on the Island at any time prior to this accident?

A. No, sir, I didn't know or hear anything about Mr. Theriot. Someone in the crowd mentioned his name—

[fol. 88] The Court: Just a minute. Take the witness. That is hearsay evidence.

Proceed to something else.

By Mr. Brumfield:

Q. Now, Mr. Prudhomme, what did you do then?

A. Well, we went to Golden Meadow and I inquired as to Mr. Theriot's whereabouts. However, I didn't know his full name. I just knew that it was "Mr. Theriot," and someone said that he was—

Q. Don't say what someone said. Just what did you do. Did you look at Mr. Theriot's car?

A. That's right. We tried to locate his car, and I think the trooper spotted a car across the canal from—I think that is Highway 1 that we were on.

Q. And where was Mr. Theriot's car?

A. Well, going, leaving the Island, it was on the right-hand side of the canal, in front of a lugger that was being built.

Q. And did you go over to the car and examine it?

A. Yes, I did.

Q. Will you describe to the Jury this car that you saw there?

A. Well, it was, I think, a 1955—56 model Oldsmobile, two-tone. The car had been damaged considerably, and I [fol. 89] wanted to have the car brought around to the other side, where we could examine it more thoroughly, and I tried to find Mr. Theriot and they told me that he had gone off with someone in an automobile.

Q. I show you these photographs which have been introduced in evidence, from Gautreau-9 through Gautreau-12, and here you have Gautreau-11, and also Gautreau-13, and

I ask you if those are photographs of the Theriot automobile? (Photographs to witness.)

A. Yes, this is where it was located, in front of the ship, or boat, that was being built (indicating). If I'm not mistaken, that is a police officer here, writing down something (indicating on photograph).

Q. What picture is that one that you are looking at?

A. This is Gautreau-13.

Q. Examine those photographs, if you will, first, and then I will have you describe them.

Would you describe to the Jury just the type and kind of indentations or damage done to that car that you saw?

Mr. Hughes: We object, if the Court please. The photographs show the exact damage done to the car.

The Court: Mr. Prudhomme, do you recognize the car in those pictures, 7 through 13?

[fol. 90] The Witness: Yes, sir.

The Court: And the damage as shown in those pictures was the damage that you saw at the time?

The Witness: Yes, sir.

The Court: All right. Let's proceed.

By Mr. Brumfield:

Q. Now, what did you do with the automobile after you examined it at that point?

A. Well, Mr. Theriot drove up a while later, and I asked him if he had any objections to us taking the car over to the Town Marshal's Office, and he said, no, that he didn't. And, we drove the car over to the office and gave it a thorough examination as far as the upper part, the outside of the car was concerned.

Q. Will you describe that examination, and then I will ask you if you took any type of scrapings or any evidence at all from the automobile?

A. Well, yes. From what I viewed on the car, to me it looked as though it was damaged by something that I figured was soft—

The Court: Just a minute.

[fol. 91] Mr. Hughes: We are getting an opinion here, your Honor.

The Court: Just say what you found on the car, what you looked for, and what you saw.

The Witness: On the hood of the vehicle, approximately right here (indicating on photograph) there was some blue coloring, as though it—

The Court: You say some blue coloring?

The Witness: Yes, sir, I wouldn't say that it was paint, but it looked like it was a dye.

The Court: Was it foreign to the car?

The Witness: Yes, sir. The car at this particular spot was a cream or white color, and this was a blue coloring, and it looked like it could have been a—

The Court: Don't say what it could have been. Just tell the Jury what it was, the best way you can describe it.

By Mr. Brumfield:

Q. What part of the car are you pointing to now, so [fol. 92] that the Jury will understand?

A. Right on the hood here (indicating on photograph).

Q. On the right part of the hood, here (indicating on photograph)?

A. Yes, to the rear, to the windshield.

Q. What number is that?

A. That is Number 10.

Q. That is Gautreau-10?

A. Yes, sir.

Q. What did you do with this substance that you say you scraped, this blue—

Q. We had some small containers that Officer Gautreau had in his car. I took my penknife and scraped some of the paint from that particular spot, and put it in this little container, and put a rubber band around it.

Q. Did you take any other scrapings or evidence from the car?

A. Yes, at different spots there appeared to be a powder, white-looking dust on there, so I also tried to take some of that with—I think I went inside and got either some tissue paper or a Kleenex, and wet it, and took some of that and also put it in a small container.

Q. Where was this white substance you described?

A. It was more or less over the whole car, mostly in the front.

[fol. 93] Q. And did you find any other foreign substance or any other evidence that you took in the car?

A. I then asked Mr. Theriot if he objected to us taking the car in and putting it on a grease rack. There was none in the immediate vicinity, so he said no, that he didn't mind, so we drove the car to a service station approximately two or three miles from this office, and we had the car lifted on a grease rack in a garage, and we checked the chassis.

Q. What did you find?

A. On the chassis we found some hair-like substances that looked like they were hairs, long fibers, and we also put those in a container. I think there was about three or four of them. Three or four strands.

Q. Did you take any strands from the head of Mr. Mercer?

A. I did, sir. I went to Muhelisen's Funeral Parlor, where the body was being held, and I took hairs from, I think, six or seven parts of the head and face.

Q. What did you do with that evidence?

A. I put that on a white piece of paper, with Scotch tape over it, and brought that to the East Bank Office.

Q. And did you find anything else on the car?

A. No, sir, at the time I didn't.

Q. What did you do with this evidence, Officer Prudhomme?

A. I brought the evidence to the East Bank Sheriff's Office. We arrived very late that night, due to the fact that [fol. 94] on the way in we had another investigation to make, and I gave the stuff to the desk sergeant, whose name I don't recall at the present time, and together we locked it in a steel filing cabinet.

Q. And that is the evidence which you have described?

A. Yes, sir.

Q. Did you all go make some notes of the investigation?

A. Yes, I did make notes, and the following day I wrote up a report in longhand and brought that to the East Bank Office, and that was put in a mesh container on the desk.

Q. What happened to this evidence and your report?

A. That, I don't know, sir.

Q. Was it ever sent to the laboratory or to the State Police?

A. I asked the chief deputy, Mr. Stewart, the next morning if he wanted me to bring that evidence to Baton Rouge, and he told me, no, that—I think he said that he was going to consult the District Attorney first. We were short of men at the time, very short of men, and he said that he couldn't spare me to send me to Baton Rouge that particular day.

Well, about, I would say about three or four days later I got one of the officers that was on the desk, one of the desk sergeants, to open the file cabinet where the evidence was locked, and I found all the bags were opened. The stuff was still there—I recall seeing the lunch pail, the cap, and [fol. 95] articles of clothing, they were still there, but all the bags had been opened. I had stapled them with a stapling machine. And, when I saw that they had been opened, whether intentionally or unintentionally, I decided that I wouldn't send them to the laboratory because they wouldn't be fair either way.

Q. What happened to this evidence?

A. That I don't know, sir. That was around election time, and it was quite a turmoil in that office, and we had to move, and so forth. I don't recall ever seeing it since.

Q. Was that, the December 18th, and 19th, and 20th, along there, was that between the First and the Second Primary of the Sheriff's election?

A. Yes, it was.

Q. Now, did you conduct an investigation, other than what you have described, with reference to Mr. Theriot's car? Did you interview any witnesses or people?

A. No, sir, Well, I did interview other witnesses, however, they were all pertaining to Mr. Theriot. There were other names mentioned and there was a deputy from the Island who said he was going to check them up.

Mr. Hughes: Objection, your Honor.

The Court: Don't say what anybody else said.

By Mr. Brumfield:

[fol. 96] Q. Did you conduct an investigation of—or a hearing there in Golden Meadow that Monday afternoon?

A. Yes, sir.

Q. Where was that held?

A. That was in the Marshal's Office, the Town Marshal.

Q. The Town Marshal of Golden Meadow?

A. Yes, sir.

Q. Do you know the names of the people that you interrogated there? Do you recall their names?

A. No, sir, I don't. I remember one was a man and his wife.

Q. Would that be Mr. & Mrs. Fink?

A. Yes, I think that is the name.

Q. Do you recall anyone else?

A. No, sir.

Q. Did you talk to Mr. Theriot there and interview him?

A. I did, sir, for quite a few hours.

Q. Did you ask him how his car came to be damaged?

A. Yes, I did, and he replied that he had had an accident with a pickup truck, and that a board or log, or something from the pickup truck had fallen off and hit in the front of his vehicle.

Q. Did you go back to Grand Isle to interrogate any witnesses or make an investigation?

A. No, sir, I didn't.

Q. Did you go out to the scene, at the point where Mr. [fol. 97] Theriot pointed out that he had had this accident with a truck?

A. Yes, I did, with Mr. Theriot, and Deputy Duet, from Golden Meadow.

Q. Did you notice any tire marks or evidence where a car had gone off the road to the left at the situs of this accident?

A. I don't recall any tire marks going off the road, however, there were skid marks on the surface of the road, which was a sort of a black top, very coarse road, and there was no chance of tracing any particular tire markings, threads.

Q. You didn't see the tire marks where a car had gone off the road and then back on again?

A. I don't recall that, sir, no, sir.

Q. Did you see this piece of wood?

A. Yes, there was a piece, to the best of my knowledge, about a 6x6 board, with a nail or a spike sticking out.

Q. Where was the nail or spike?

A. It was protruding from one end of the board.

Q. From one end?

A. Yes, sir.

Q. Do you know how far it protruded, approximately?

A. Oh, yes, it was sticking out, I would say, two and a half or three inches, at least.

Q. And where was it when you located it?

A. It was off the highway itself, in the grass, or side of the road.

[fol. 98] Q. Do you remember what side?

A. On the right-hand side, as I remember, leaving the Island.

Q. And was it right near the asphalt surface or was it out?

A. I would say it was eight, ten feet from the end of the road.

Q. Did you take this piece of wood into your custody?

A. No, sir, I didn't.

Q. Why didn't you do that?

A. I didn't see anything that would connect it to the accident that I was investigating.

Q. Were there any other suspects besides Mr. Theriot to this accident?

A. At the original scene of the accident there was a few young boys mentioned as hot-rodders, however, I left that to the local deputies to investigate.

Q. Was this the only vehicle that you examined?

A. Yes, it was.

Mr. Brumfield: That is all. Answer the questions of Mr. Hughes.

Cross examination.

By Mr. Hughes:

Q. Mr. Prudhomme, when you went down to the Isle, did State Trooper Folse join you down there?

[fol. 99] A. Yes, he did.

Q. Did he come up to Golden Meadow with you?

A. He did, sir.

Q. Was he present during the examination of the automobile?

A. He was, sir.

Q. Was he present when you went out to the scene of the accident that Mr. Theriot said he had?

A. No, I don't think he was.

Q. Do you recall he was not present, or are you uncertain as to whether he was?

A. I am uncertain as to whether he went to the scene where Mr. Theriot claimed he had an accident.

Q. But he could have been there?

A. He could have been there, yes.

Q. At the scene of that accident, when you found this piece of wood, isn't it a fact that you took some paint scrapings off the nail that was in that board?

A. No, sir, I didn't. I looked at the paint scrapings, but I didn't take them.

Q. There were paint scrapings on the nail?

A. Mr. Theriot said they were paint scrapings. It looked to be paint scrapings.

Q. It was something that appeared to be paint scrapings on the nail?

A. Yes, sir.

[fol. 100] Q. Isn't it a fact that you took the piece of wood with the nail and put it in your car?

A. No, sir, I did not.

Q. You saw no track there of a vehicle having gone off the road?

A. No, sir,—the only track that I recall was skid marks on the road itself

Q. Is your recollection vague about that?

A. Well, to a certain extent, but I don't recall seeing any tracks going off the road. If I may, I would like to state, that Mr. Duet was with me there, and I was more or less examining one part of the, say, for instance, this piece of wood, while he could have been—while he could have possibly been examining these marks.

Q. When you arrived at Golden Meadow, was Mr. Theriot's car out to be seen, or was there any attempt to conceal it?

A. No, sir. It was wide open. It could have been viewed from the opposite side that we were on very easily.

Q. Did he cooperate with you in your investigation?

A. He did, sir, one hundred per cent.

Q. He gave you permission to do whatever you wanted to do?

A. Yes, sir.

Q. Now, I understand you to testify that you took a sample of paint from Mr. Theriot's automobile?

A. I did.

[fol. 101] Q. Is that correct?

A. Yes, sir.

Q. How many samples of paint did you take from his automobile?

A. I had two different containers with paint samples.

Q. You had two?

A. Two containers. In other words, we used a little cardboard container and I took two samples from it.

Q. And from where did you take those samples?

A. As I pointed out before, sir, where this indentation is on the hood (indicating on photograph).

The Court: Let the Jury see it.

By Mr. Hughes:

Q. Are you referring to Gautreau-10?

A. Yes, sir.

Q. And will you point out the indentations on the hood?

A. Right here (indicating on photograph).

Q. Both samples were taken from that place?

A. Yes, sir.

Q. Where was the blue mark that you spoke of?

A. On the hood. The blue mark was right on this indentation, at the back part of the hood (indicating on photograph).

Q. And you saw no blue marks in the vicinity of the headlight of the automobile?

[fol. 102] A. No, sir. The rim of the headlight was missing, sir, and there wasn't anything else I could see there.

Q. And no marks other than on the hood?

A. No, sir.

Q. How many statements have you given about this accident?

A. Statements?

Q. Yes, how many written statements?

A. Written statements? One, sir.

Q. And to whom did you give that statement?

A. It was an insurance investigator.

Q. Do you recall whether or not you mentioned the blue spot on that statement?

A. I don't recall. I'll tell you what, sir, I had been on duty and I was asleep when the gentleman came to my house, and I don't recall if I actually told him about that blue scraping or not.

Q. Was that statement taken on September 18th, 1956?

A. Approximately that time, yes.

Q. Do you think it is possible, Mr. Prudhomme, that you didn't mention that blue spot?

A. It is possible, yes.

Q. Would you consider it not of sufficient importance to be worthy of mention?

A. No, I wouldn't say that.

Q. Did you intend to conceal it?

[fol. 103] A. No, sir, not in the least.

Q. Did you at any time after this accident forget about it?

A. Forget about what?

Q. About the blue spot?

A. No, sir.

Q. So then, when you gave the statement in September, you knew about it?

A. I guess I did. Sure.

Q. You haven't remembered it since then?

A. How do you mean remember it? Unless the case is recalled to me, I had no reason to remember it. I had no reason to remember it.

Q. Well, I'm going to show you a statement dated September, 18th, 1956, and let you read it, Mr. Prudhomme, and I'm going to ask you if that is the statement that you referred to, and if you mentioned it? (Document to witness.)

A. Yes.

Mr. Brumfield: I would like an opportunity to read the document.

Mr. Hughes: You may read it. (Document to Counsel.)

The Court: Proceed.

[fol. 104] By Mr. Hughes:

Q. I want to ask you if you mentioned the blue spot in that statement?

A. No, sir, I did not.

May I make a statement?

The Court: Certainly.

The Witness: However, I did mention in the statement that I took paint scrapings from two spots. I would have to have some reason to take the paint scrapings.

By Mr. Hughes:

Q. Did you take samples of the clothing that Mr. Mercer had on?

A. I had the whole piece of clothing, the jacket, the coveralls, and so forth. I was going to send that to the lab.

Q. What happened to those items?

A. They were left in the evidence locker, like I say, and when I found the bag opened and the evidence tampered with, I refused to have anything further to do with it. I just left it there.

Q. Where are they now?

A. I don't know sir.

Q. Did you make a report to the Sheriff's Office?

[fol. 105] A. I did, sir. As I said before, I put the report in the wire baskets, on the desk, the sergeant's desk.

Q. How long after you made your report did you discover that it was missing?

A. I didn't, sir, I didn't know—I didn't know exactly what happened to it. If I may, I would like to explain that at this particular time we were very under-staffed. I may be investigating a murder, or something, and then next I may be answering a call for a dog bite to someone, and I didn't have time to see that everything was according to Hoyle. The desk sergeant had to type all our reports as they were

brought in, and it was really tough for them, and sometimes they stayed there for weeks before they ever got actually typed.

Q. Mr. Prudhomme, does that account for the fact that here is an investigation of a man killed on the side of a highway, evidently. You investigated one man, and you left the rest of the investigation to the deputy sheriffs at Grand Isle, and then you forget all about it?

A. No, sir, I didn't forget about it. I asked permission the following morning to take my evidence to Baton Rouge, which I thought was the most important, because all of the other evidence was more or less from word or mouth, and I had the evidence that I wanted to take to the State Laboratory in Baton Rouge, and I was denied the permission due to the fact that we were under-staffed.

[fol. 106] Q. Did you ascertain how many automobiles were at Grand Isle that night?

A. We tried to find out about how many were at the end of the Island, but that was hard to tell.

Q. Did you check out any of those cars except Mr. Theriot's?

A. No, sir, I didn't.

Q. Did you make any attempt to do so?

A. No, sir, I didn't.

Mr. Hughes: That is all.

Redirect examination.

By Mr. Brumfield:

Q. Mr. Prudhmome, you say that this statement was given by you to an insurance adjuster?

A. Yes, sir.

Q. Was he adjuster for the Hartford Accident & Indemnity Company, the insurance on this Theriot car?

A. Yes, sir.

Q. Did he write this out or did you write it out?

A. He wrote it out.

Q. I notice that you said here—

Mr. Hughes: Your Honor, there is a lot in that statement that is objectionable. I haven't offered it. I simply let the

witness read it to refresh his memory and he answered the [fol. 107] questions I asked him. However, he is not under cross-examination now.

The Court: If there is a part of the statement that relates to your examination, then he has a right to go into that.

Mr. Hughes: That is right, if it is confined to those tests.

The Court: In other words, if there is anything in that statement with reference to blue spots on the car, or to any scrapings that he made, you may ask him about it.

Mr. Brumfield: That's what I was doing, Judge.

The Court: Proceed.

By Mr. Brumfield:

Q. I notice, and I will read from this statement, where you said, "I took a sample of paint off the hood and by the headlight—"?

A. Yes.

Q. And you go on, "Later I put the car up on the grease rack and took what appeared to be hair from under the car—"

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. Just where was this, you called it "blue spot or dye", and are you speaking of dye on the clothing, or just what do [fol. 108] you mean by that?

A. Well, it had an appearance that it could have been done by clothing, since it was porous-like.

Q. And where was that?

A. On the hood, sir.

Q. On the top part of the hood, on the right side?

A. Yes.

Q. Now, did Mr. Theriot deny leaving Grand Isle at about the time you ascertained this accident happened the day before? I'll read that in your statement, or, if you want to look at it? (Document shown to witness.)

A. Yes, he advised that he had left the Island quite sometime before that.

Q. Now, this white substance that you scraped, you took off, what was it, Officer Prudhomme?

Mr. Hughes: If that calls for an opinion, I object.
The Court: I sustain the objection.

By Mr. Brumfield:

Q. Do you know what it was?
A. No, sir, I don't. I asked Mr. Theriot if he had had the car washed, and he said he hadn't.

The Court: He said what?
[fol. 109] The Witness: I asked Mr. Theriot if he had had the car washed that morning, and he said he hadn't.
The Court: He had not?
The Witness: Had not. I stated that to me it appeared to be a soft—
The Court: What did it look like? Describe it the best way you can?
The Witness: Well, your Honor, I don't know if you are familiar with washing an automobile, but if you wash your car without removing all the soap, it leaves a film. That is what it appeared to me.
The Court: Proceed.

By Mr. Brumfield:

Q. Officer Prudhomme, during your years of service—well, how long have you been a deputy?
A. Approximately nine years.
Q. Have you investigated many accidents during that time?
A. Yes, quite a few accidents.
Q. How many cars would you say you examined involved [fol. 110] in collisions with all types of objects, other cars, soft objects, animals, human beings?
A. I would say that it runs in the hundreds.
Q. That is your official duty, to do that, isn't it, to make these investigations and examinations?
A. Yes, sir.
Q. I ask you, Officer Prudhomme, could these indentations or the damage to this Theriot car have been caused by it striking the rear end of a stake body truck (indicating on photograph)?

Mr. Hughes: I object to the question, if your Honor please. I don't think the witness is qualified as an expert. That is a matter for the laboratory.

The Court: I sustain the objection.

Let's proceed.

Mr. Brumfield: I believe that is all.

Recross examination.

By Mr. Hughes:

Q. Officer Prudhomme, are you prepared to say that the substance that you took from underneath that vehicle was hair?

A. No, sir, I couldn't swear to it.

[fol. 111] Mr. Hughes: That is all.

The Court: This officer may be excused?

Mr. Brumfield: Yes, sir.

Mr. Hughes: Yes, sir.

The Court: You are excused, Officer.

Mr. Brumfield: We would now like to call Mr. Douglas Millett.

Douglas Milliet called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Would you please state your full name, and talk up loud so that his Honor can hear you, and these gentlemen over here can hear you, and the rest of the Jury can hear you.

A. Douglas M. Milliet.

Q. Where do you live, Mr. Milliet?

A. I reside at 6212 Nora Street, Metairie, Louisiana.

Q. And are you connected with the Parish Government of Jefferson Parish?

A. Not at this time. I am employed with the State now.
[fol. 112] Q. But, have you been connected with that Government?

A. With Jefferson Parish I was.

Q. In what capacity?

A. Deputy Sheriff.

Q. Were you a deputy sheriff on December 18th, 19th of 1955?

A. I was.

Q. Who was the sheriff then?

A. Frank J. Clancy.

Q. And what is your occupation now? How are you connected with the State?

A. I'm a trooper with the Division of State Police. I'm a trooper.

Q. Where are you assigned?

A. Troop B, in New Orleans.

Q. When did you first become a deputy with Sheriff Clancy? Do you recall, approximately?

A. I believe it was in February, 1955.

Q. And where were you assigned, or did you have any particular assignment?

A. Yes, at that time I was in Grand Island.

Q. And where were you living then?

A. In Grand Island.

Q. And your duty or assignment, was it confined to Grand Isle, to the Grand Isle area?

A. More or less. Most of our work was done in Grand
[fol. 113] Isle, but at times I came up to the upper part of the Parish.

Q. Mr. Milliet, did you learn of an accident which occurred on December 19th, 1955, on Grand Isle, in which Byrd Mercer was killed?

A. I did.

Q. How did you get this information?

A. I came in from a hunting trip the morning of December 19th, and it was being talked about along the dock where we docked our boat coming in.

Q. And who was with you?

A. At the time?

Q. Yes?

A. It was Nelson Guidry, Louis Guidry, Laymon Savoy, and Bobby Senton.

Q. And who is Nelson Guidry?

A. He is my uncle.

Q. Was he a deputy sheriff or an officer?

A. Prior to the time I was, he was deputy sheriff for five and a half years.

Q. With Sheriff Clancy?

A. That is correct.

Q. But at that time he wasn't a deputy sheriff?

A. No, sir, he wasn't.

Q. What did you do then, after you learned of this?

A. After I learned of the accident, I immediately proceeded to Judge Adams' house, who, more or less, has [fol. 114] charge of us on Grand Isle, with two deputies there.

Q. Judge who's house?

A. Judge Adams, Justice of the Peace, Mercedes T. Adams.

Q. Is that a lady?

A. Yes, she is.

Q. And she is Justice of the Peace?

A. She was.

Q. I mean she was then?

A. Yes, sir.

Q. And you went to her house?

A. Yes.

Q. What did she do?

A. Well, for—she informed me as to what had happened. She told me that somebody had been killed and mentioned the name Mercer, and that the investigating team had been sent down from Gretna, which was our main office, and they had already left to go to Golden Meadow because they had a suspect in mind.

Q. What did you do then?

A. I then proceeded to Golden Meadow.

Q. And did anyone go with you?

A. Guidry went with me, Nelson. I didn't know if I could get my car back to Grand Isle, so he drove up with me in case I had to keep going to Gretna and bring my car back.

Q. When you got to Golden Meadow, what did you do? [fol. 115] A. Well, I met the investigating team, Red Prudhomme and the Coroner's Assistant, Billy Gautreau.

Q. You saw them there in Golden Meadow?

A. Yes, sir.

Q. Were you present when the Theriot automobile was examined?

A. When it was examined? Which time?

Q. Well, when the scrapings, the evidence, was taken from it?

A. I was.

Q. What was done on the car at that time?

A. The car was behind the jail house, the Golden Meadow Town Hall, and Mr. Prudhomme took some scrapings from the hood of a blue substance that was in the paint, and after that we took the car to a service station and put it on a grease rack and went into a more thorough examination of it.

Q. What was found there?

A. At that time I got underneath the car and I found on the right shock absorber what I thought to be hair, and—

Q. What did you do with that?

A. I placed it in an envelope and handed it to Mr. Red Prudhomme, who was in charge of the investigation.

Q. What did you do with this little substance, the scrapings?

A. He scraped that off himself, and this was also placed [fol. 116] in an envelope and placed in his possession.

Q. Was anything else found on the car?

A. Yes, Guidry found a piece of rag, a medium-sized bath towel is what it appeared to be, with red stains on it, and some mud.

Q. Where was that?

A. He told me—I seen him take it out of the car, but he stated—

Q. Don't say what he stated. Did you see him take it out of the car?

A. Out of the car, yes.

Q. What did he do with that?

A. He handed it to me.

Q. What did you do with it?
A. I, in turn, gave it to Mr. Prudhomme.
Q. And when you said "red substance," what was that?
A. To me it appeared to be blood.
Q. Was anything else found in the car?
A. We found a powder that seemed to be soap powder, fine powder on the car, on the top of the hood of the car.
Q. What did you do with that? Did you make or take scrapings of that?
A. He thought he had enough, but when he scooped up the blue substance from the paint, he found some white powder there.
Q. You say that he found some white powder there?
[fol. 117] A. Some white power with it, yes.
Q. And who had this evidence, these scrapings and this hair and towel? Who had that?
A. Red Prudhomme, Deputy Sheriff Red Prudhomme.
Q. Who was in charge of this investigation?
A. Mr. Prudhomme.
Q. Was he your superior?
A. At that particular time he was in charge of the investigation.
Q. Now, Mr. Milliet, did you hear Mr. Paris Theriot give an explanation as to what caused his car to be damaged?
A. Yes, he stated to Mr. Guidry that he hit a cow.

Mr. Hughes: I object. I don't think it was in his presence.
The Court: Were you present?
The Witness: Yes, I was, your Honor.
The Court: Proceed.

By Mr. Brumfield:

Q. What did he say?
A. He stated that he had hit a cow.
Q. He hit a cow?
A. Yes.
Q. Now, Mr. Milliet, do you know what happened to this evidence?
[fol. 118] A. No, sir, I don't.
Q. Did you ever make any inquiry about it?

A. Yes, I did.

Q. What did you learn? What did you find out?

A. I checked with the laboratory at Baton Rouge, and the Criminal Laboratory in Orleans Parish. I checked both offices in the Jefferson Parish Department, and we never had no trace of the evidence.

Q. It disappeared?

A. It disappeared.

Mr. Brumfield: I tender the witness.

Cross examination.

By Mr. Hughes:

Q. Mr. Milliet, you testified that you had been hunting?

A. Yes, sir.

Q. What time did you get to Grand Isle?

A. Approximately at 9:30 or 10:00 o'clock.

Q. Did you change your clothes before you went to the scene?

A. Yes, I believe I got in uniform.

Q. About what time did you arrive at the scene where the body was found?

A. I passed at the scene on my way up to see Mrs. Adams, and merely looked around, since the body had [fol. 119] already left there, and there was just a blanket where it had been. I imagine that was around 11:00 o'clock, I reckon.

Q. Were Deputies Gautreau and Prudhomme there or had they left the Island?

A. They had left the Island.

Q. What time did you get to Golden Meadow?

A. I imagine I got to Golden Meadow about 12:30 or 1:00 o'clock.

Q. What was going on when you got there? Where was Theriot's car?

A. I believe they had gotten the car by that time.

Q. Where did you first see Theriot's car?

A. I first saw Mr. Theriot's car behind the Town Hall.

Q. And that was between 12:30 and 1:00 o'clock?

A. To the best of my knowledge. I'll go a little further and I'll say between 12:30 and 1:30.

Q. Where was Mr. Theriot?

A. I don't know. They hadn't started to question Mr. Theriot yet.

Q. You didn't see him when you saw the car?

A. No, I didn't.

Q. Who did you see?

A. I talked to Mr. Red Prudhomme and Billy Gautreau.

Q. Where were they?

A. At the Town Hall.

[fol. 120] Q. At the automobile or in the Town Hall?

A. In the Town Hall, Golden Meadow Town Hall.

Q. In the Town Hall?

A. Well, I don't remember exactly if they were in the Town Hall or out of the Town Hall. I know that they were —we rendezvoused at the Town Hall, and that is where I found them.

Q. Did you see Officer Folse there?

A. I can't recall if he was there at that time.

Q. Did you see Sheriff Plaisance, the sheriff from Golden Meadow?

A. The Marshal, he was there, and Plaisance and Mr. Duet was there.

Q. They were both there when you arrived?

A. I believe so.

Q. Prudhomme and Gautreau?

A. Yes.

Q. And you don't recall whether Folse was there or not?

A. I don't.

Q. Were you there when photographs were taken of the automobile?

A. I was there when the second set of photographs were taken of the automobile.

Q. What second set? I don't understand.

A. The set was taken while we were taking the evidence [fol. 121] off the car, when we had it on the grease rack. That is when the second set of photographs were taken. They were colored films.

Q. Where are these photographs?

A. They are not here any more. They went with the evidence.

Q. Who took them?

A. I don't know. I have been trying to find that out for a long time.

Q. Who took the pictures?

A. Billy Gautreau.

Q. Billy Gautreau took more pictures than the ones in evidence here?

A. Yes, he did.

Q. Have you ever seen the ones in evidence?

A. Yes.

(Photographs shown to witness.)

Q. You have seen this picture marked Gautreau—well, these, Gautreau-9, 11, 12, 13, and 10? (Photographs to witness.)

A. Yes. There were more pictures than these taken.

Q. Well, were these the first set?

A. I wasn't there when these pictures were taken.

Q. There were more pictures taken when his car was on the grease rack?

[fol. 122] A. Yes, sir.

Q. By Gautreau?

A. Yes, by Billy Gautreau.

Q. What did he take pictures of, as far as you could tell?

A. Well, different angles of the car.

Q. Now, who found the hair, or what appears to be hair under the car?

A. I found what appeared to be hair underneath the car.

Q. You found it?

A. I did.

Q. Were you the first one to look under the car?

A. Yes, I believe I was.

Q. Who did you tell that you had found it?

A. Deputy Prudhomme.

Q. Where was he?

A. Standing directly in front of the car.

Q. Was anybody under the car besides you?

A. At different times.

Q. At the time you found the hair?

A. I couldn't say.
Q. But you found it?
A. I found it.
Q. Are you prepared to swear it was hair?
A. I'm prepared to swear that I believe it was hair.
[fol. 123] Q. I didn't ask you that.
A. No, sir, I'm not. I don't know whether it was hair or not, no, I don't.
Q. So you don't know whether it was hair or not?
A. No, I don't.
Q. You found what appeared to be hair?
A. Yes, sir.
Q. And your uncle, Guidry, came with you to Golden Meadow, is that correct?
A. That is correct.
Q. And he found the rag?
A. That is correct.
Q. Where was the rag?
A. I didn't see him, where he took the rag from. I can tell you where he stated he took it from.
Q. You don't know whether he found it or not?
A. I seen him taking it from the car.
Q. You saw him taking it from the car?
A. From the car, yes.
Q. Where from the car?
A. I don't know where from the car. I was stooping in the car and he came up with the rag in his hand.
Q. On the inside of the car?
A. On the inside of the car.
Q. So you saw him coming up from the inside of the car [fol. 124] with a rag, is that correct?
A. That is correct.
Q. And that rag; you don't know where it was in the car?
A. No, I don't.
Q. Did you look at the rag?
A. Yes, I did.
Q. And you say that there appeared to be blood on it?
A. It did.
Q. What color was it?
A. Sort of brown, dark brown.

Q. A brown, a dark brown?

A. Yes, sir.

Q. Could that rag have come from the scene of the accident?

A. It could.

Q. It could have come from the scene of the accident?

A. Yes, it could have.

Q. And that rag was given to Deputy Prudhomme?

A. That is correct.

Q. And he put that in a container?

A. That is correct.

Q. What type of container?

A. I believe he put that in an envelope.

Q. How many specimens and exhibits did Mr. Prudhomme have at this time? Start with the paint scrapings, and whatever you saw.

[fol. 125] A. I handed him the paint scrapings and the rag —I mean I handed him the hair, what I believed to be hair, and the rag.

Q. You handed him the rag?

A. That's correct.

Q. But Mr. Guidry found the rag?

A. That's right.

Q. But he gave it to you?

A. That's right.

Q. And you gave it to Prudhomme?

A. That's correct.

Q. You gave him the hair and the rag, and what else?

A. That is the only evidence I turned over to him.

Q. Where was this substance that appeared to be hair, what part of the automobile was that?

A. I don't know the exact name—right under the front part, the lower extremity, over by the wheel, like a shock absorber, or something—it's a shock, or something.

Q. Had there been anybody walking around under that car?

A. Not that I seen.

Q. So then you were the first one under the car?

A. When we had it on the grease rack, yes, I was the first one.

Q. Wasn't that hair out of your own head?

A. Not hardly. I had a hat on my head.

[fol. 126] Q. So when Prudhomme says, or anybody else says that they found hair there, they are mistaken, and you found it?

A. Pardon me?

Q. I say if anybody else testified that they found what appeared to be hair under that car, they are mistaken, and you were the one that found it, is that correct?

A. That is correct.

Q. Mr. Milliet, you have been a deputy sheriff for a period of about ten months—rather, you had been a deputy sheriff for a period of about ten months at that time, is that correct?

A. Just about, that's right.

Q. Are you and Mr. Theriot friendly, and that is Mr. Paris Theriot that I'm speaking of?

A. I thought we were friendly.

Q. You did think you were friendly?

A. Yes, sir.

Q. Well, did you see him often?

A. I have seen him on Grand Isle at times.

Q. Would you go fishing or hunting with him?

A. Yes, I would have.

Q. Well, did you?

A. Did I?

Q. Yes?

A. No, sir.

Q. And there is no bad feeling between you?

[fol. 127] A. Not as far as I was concerned.

Q. Did you threaten Mr. Theriot, or did you tell Mr. Theriot that you were "going to get him"?

A. I did not.

Q. When you came to the Courthouse, is it not a fact that you told Mr. Theriot that you had him now, and that you would get even with him?

A. That is not a fact.

Q. You deny that?

A. I deny.

Q. Did you make a report of your part in this investigation?

A. I did not. Mr. Prudhomme made the report.

Q. Did you conduct any other investigation with respect to this occurrence?

A. As far as taking statements, yes.

Q. Did you investigate anybody other than Mr. Theriot?

A. No, sir, I did not.

Q. Did you make any attempt to find out who was on the Island that night, or what vehicles might have been in the vicinity?

A. No, sir, I was assisting in the investigation. I had no authority over who I was to investigate.

Q. How long did you stay in Golden Meadow?

A. I believe we left about 10:30 that night, 11:00 o'clock.

Q. Did you ever take any further part in this investigation?

[fol. 128] A. The following day I took these statements.

Q. Who did you take statements from?

A. From Louis Bradberry and Clifford Centanni.

Q. All with respect to Mr. Theriot's activities, isn't that correct?

A. That is correct.

Q. And you made no effort to check anyone else?

A. No, sir. That was my assignment.

Q. Who gave you that assignment?

A. Deputy Prudhomme.

Q. When Deputy Prudhomme said that he told you to check out some hot-rodders, he must have been mistaken?

The Court: Just a minute, please. The Jury will disregard that statement. What Counsel says is not evidence, and there is no evidence of any such statement in the record.

Mr. Hughes: I beg your pardon. I apologize if my memory is faulty. I'm checking my notes now to see exactly what the witness said.

By Mr. Hughes:

Q. Let me ask you this; you were not assigned any particular or any investigation whatsoever by Officer Prudhomme, other than about Theriot, is that correct?

A. No, sir.

[fol. 129] Q. No other person?

A. No other person. You said no other person?

Q. Yes?

A. You mean to be investigated?

Q. Yes?

A. No, sir.

Q. Who was present when Mr. Theriot told Guidry he had hit a cow, besides you and Guidry?

A. I don't remember exactly. It was several people in the office. The other officers were there.

Q. Name the other officers?

A. Prudhomme was in the office.

Q. Prudhomme was there?

A. I don't know if he was within hearing distance but he was in the office. That was Prudhomme, Gautreau, and—

Q. Was Gautreau within hearing distance?

A. I don't know.

Q. Who else?

A. And Duet was in the office, Deputy Sheriff Duet.

Q. He was in hearing distance?

A. I can't recall if he was in hearing distance or not. He was in the room.

Q. But you know that you and Guidry were within hearing distance?

A. I was, definitely.

[fol. 130] Q. But you are uncertain as to whether the other people were or not?

A. That is right.

Q. Had anybody questioned Mr. Theriot when he gave you that information? Do you know?

A. I don't know. I don't know if he had been questioned about it or not.

Q. How long after you arrived at Golden Meadow did Mr. Theriot make that statement?

A. It was kind of dark, because right after that I walked back outside, looking at the car again, and the car was parked at the Town Hall at that time.

Q. Was that after the inspection of the automobile?

A. That was before the inspection of the automobile?

Q. Did you go out to check the scene of the accident that Mr. Theriot claimed he had?

A. The following day, but not that—

Q. The following day?

A. That was on the 20th. Mr. Prudhomme and them went on the—went on the 19th.

Q. Was the statement made to you after these other officers had gone to check the scene of that accident?

A. I don't know what time they checked that scene of the accident.

Q. Was it daylight?

[fol. 131] A. I don't know.

Q. When did they check the scene of the accident?

A. I don't know if it was daylight or not.

Q. Could they have checked the scene of the accident before that statement was made to you?

A. I imagine they could have, yes.

Q. At the time, Mr. Theriot was supposed to have told you that he struck a cow, were you aware of the fact he had said he'd hit a truck?

A. I wasn't aware of anything at that particular time, what he had said, because I hadn't talked to him.

Q. When did you find out that the scene of the supposed accident checked?

A. L[illegible]n, at night, when I talked to Mr. Prudhomme and Billy Gautreau.

Q. After Mr. Theriot had told you that he had struck a cow?

A. That's correct.

Q. Did you tell them that he had told you that he had struck a cow?

A. I believe I mentioned it to them.

Q. Was it then that you found out that they had checked this other scene?

A. I found out that they had checked the other scene later that night, when we got through looking over the car.

[fol. 132] Q. Suppose you start with when you got to Golden Meadow and tell me what you did? When you first arrived at Golden Meadow, what did you do?

A. It is kind of hard to remember two years ago, but like I said, I got there I believe between 12:30 and 1:30, and I talked to Officer Prudhomme and Officer Gautreau, and

Officer Gautreau and I got in the car and went to Grand Isle looking for a couple of witnesses that they wanted to talk to.

Q. And this was on Monday, the 19th?

A. That's correct.

Q. After you went to Golden Meadow, you went back to Grand Isle?

A. That is correct.

Q. With Officer Gautreau?

A. That's correct.

Q. And then you came back to Golden Meadow?

A. Then I came back to Golden Meadow, that's right.

Q. What time did you get back to Golden Meadow?

A. I imagine it must have been around 4:30—maybe 5:00 o'clock when we got back.

Q. What did you do then?

A. Proceeded with the investigation.

Q. And exactly what did you do?

A. I don't remember exactly what I done. Like I said, that is a long time back, and my exact movements I don't remember.

[fol. 133] Q. At that time did you put the car on the grease rack or did you take scrapings off?

A. At that time the car, when I came back, I believe the car was in the back of the Town Hall at that time.

Q. That's when you came back from Grand Island?

A. That's right.

Q. Where was it when you first got to Golden Meadow?

A. You say where was it?

Q. Where was it when you first got to Golden Meadow?

A. I don't know. I didn't have any knowledge of the car when I first got to Golden Meadow.

Q. So when you first got to Golden Meadow you didn't see Mr. Theriot's car at all?

A. I didn't know Mr. Theriot was a suspect when I got to Golden Meadow.

Q. When did you first find out that he was a suspect?

A. After I talked to Mr. Prudhomme and the other fellow, Billy Gautreau.

Q. Was that before you went to Grand Isle?

A. That was before I went back to Grand Isle.

Q. You hadn't seen Mr. Theriot's car up to that point?

A. Up to that point, no.

Q. And then you went to Grand Isle and you came back about what time?

A. About 4:30 or 5:00 o'clock, I imagine, when we got back.

[fol. 134] Q. Then what did you do?

A. Like I said, we proceeded with the investigation. I believe we three went—I believe we went into the Town Hall then and Mr. Prudhomme contacted the Sheriff, Eddie St. Marie, and ordered to pick Mr. Theriot up here.

Q. Was Mr. Theriot interrogated at that time?

A. At that time he wasn't picked up. That is when he was, I believe he was trying to contact the sheriff in order to get him picked up.

Q. What do you mean "picked up"? Was he arrested?

A. I don't believe he was arrested. I think he was merely —he volunteered coming down there, from what I can understand. I didn't go down there to pick him up. It was out of our jurisdiction. It was in Lafourche Parish.

Q. And then what happened? Did Mr. Theriot come in, or what was the next step?

A. I don't know which officer went to get him, or if he came there on his own, and then the next thing that I remember he was back there in the Town Hall.

Q. Was it dark then?

A. Like I said, it was just about getting—it may have been dark, because I needed a light to look at the front of the car.

Q. Were you the first person, as far as you know, to talk to Mr. Theriot?

A. No.

[fol. 135] Q. Who was?

A. Evidently the deputies that went to get him.

Q. Do you know who they were?

A. I don't know which ones they were.

Mr. Hughes: No further questions.

Redirect examination.

By Mr. Brumfield:

Q. Mr. Milliet, when did you sever your relationship with the Sheriff's Office?

A. On election year, right after the First Primary.

Q. Were you fired or asked to resign, or just what happened?

A. I know I was told that I lost my job on account of this case.

Mr. Brumfield: That is all.

Recross examination.

By Mr. Hughes:

Q. Where was Mr. Theriot living in Jefferson Parish?

A. To the best of my knowledge he was living in Lafourche Parish.

Q. And you were with Jefferson Parish at the time?

A. That is correct.

Mr. Hughes: That is all.

[fol. 136] The Court: Call your next witness.

Mr. Brumfield: I would like to call Nelson Guidry.

Nelson Guidry called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Will you state your name, sir?

A. Nelson Guidry.

Q. And where do you live, Mr. Guidry?

A. Grand Isle.

Q. How long have you lived down there?

A. Thirty-five years.

Q. How old are you?

A. Thirty-five.
Q. Have you been a deputy sheriff for Jefferson Parish?
A. I have been.
Q. When did you first become a deputy sheriff?
A. In 1949.
Q. And how long were you a deputy sheriff?
A. Up until 1955.
Q. On December 19th, 1955, were you on Grand Isle?
A. Yes, sir.
[fol. 137] Q. And that is on a Monday?
A. Yes, sir.
Q. Who were you with? Who were you with the morning of—that is, Monday morning of the 19th, 1955?
A. Well, on that particular morning I was coming back from a hunting trip with my brother, Milliet, and three or four other fellows.
Q. Douglas Milliet was on a hunting trip with you?
A. Yes, he was.
Q. He was a deputy sheriff at that time?
A. Yes, he was.
Q. Did you know Byrd Mercer?
A. Yes, I did.
Q. Did you know Mr. Paris Theriot?
A. Yes, I did.
Q. Did you accompany Mr. Milliet when he went to Golden Meadow?
A. Yes, I drove him up there.
Q. Do you know why he was going there?

Mr. Hughes: I object, if the Court please.
The Court: I sustain the objection.
Mr. Brumfield: It is unimportant. I withdraw the question.

[fol. 138] By Mr. Brumfield:

Q. Mr. Guidry, when you got to Golden Meadow, did you see Mr. Theriot there?
A. Yes, I did.
Q. Did you talk with him?
A. Yes, I spoke to him.

Q. Did you have a conversation with him with reference to an accident that he'd had?

A. Well, I asked the man what had happened.

Q. What did he tell you?

A. He told me that he hit a cow.

Q. That he had hit a cow?

A. That's right.

Q. Did he tell you that?

A. Yes, he did.

Q. Where were you when he told you that?

A. We were in the Golden Meadow jail house, I guess you would call it.

Q. The Town Hall?

A. Yes, the Town Hall.

Q. Was Milliet up there?

A. Milliet was there.

Q. Was a man by the name of John W. Miller there?

A. Yes, he was also there.

Q. Do you know of anybody else that was there?

[fol. 139] A. They had a few more people in the room, but I don't remember just who they were. There were four or five other people there.

Q. And you swear on your oath that is what he told you?

A. Yes, I do.

Q. Did you accuse Mr. Theriot of running over Mr. Mercer?

A. No, I didn't exactly accuse him.

Q. Did you ask him whether he did or not?

A. I asked him, yes.

Q. What did he answer to you?

A. He said, no, that he didn't think he had done it.

Q. What was his condition there? Was he nervous?

A. A little bit nervous.

Mr. Hughes: That's calling for an opinion.

The Court: I sustain the objection. It's leading.

Mr. Brumfield: It was leading, your Honor. I apologize.

By Mr. Brumfield:

Q. Mr. Guidry, were you present when some scrapings or evidence or objects of any kind were taken from the Theriot Automobile?

A. Yes, I was. I was present from the time they brought the automobile until after the investigation was over.

[fol. 140] Q. Did you see whether or not any scrapings of any kind were taken from the automobile?

A. Yes, there was.

Q. What was taken?

A. It was scrapings taken off the hood, by Officer Prudhomme and—

Q. What did he do with it?

A. He put it in an envelope and sealed it.

Q. Were there any other scrapings taken off the car?

A. Yes, they had some. That was the first scraping taken, then they had something that looked like hair and grease, and that was taken underneath the car.

Q. How was it taken underneath the car? Was the car jacked up?

A. Yes, it was put on a rack, and we got under the car and looked under.

Q. And where was this taken from? What part of the car, do you recall?

A. Well, it is the bar across from wheel to wheel—I don't know exactly what it is—

Q. What did it look like to you?

A. To me it looked like it was a hair.

Q. Did you get any objects out of the car? Did you find any object of any kind yourself?

A. Yes, sir.

[fol. 141] Q. What did you find?

A. After the automobile was let down from the rack, I opened the door and Trooper Milliet and myself were talking, and I was looking inside the automobile, and I reached behind the seat, between the seat and the seat cover, and—

Q. What did you find behind the seat and the seat cover, just exactly?

A. Well, there is a seat, and a cover over the seat, and it looked like there was something stuffed in there. Well,

I just reached in there and pulled out, and it looked like a towel. It was a towel, as a matter of fact.

Q. It was a towel?

A. Yes, about a medium-sized bath towel.

Q. What did it have on it if anything?

A. To me it looked like it was blood.

Q. What did you do with this object, the towel?

A. I turned it over to Officer Milliet.

Q. Do you know what he did with it?

A. He turned it—I think he turned it over to Red Prudhomme.

Mr. Brumfield: That is all.

Cross examination.

By Mr. Hughes:

Q. Mr. Guidry, what time did you go to Golden Meadow?

A. I couldn't say to you the exact time, sir.

[fol. 142] Q. Was it in the afternoon, the morning?

A. No, it was in the afternoon.

Q. The early afternoon? Or the evening, late?

A. Middle, late.

Q. You would say middle or late?

A. Close to, as I could say, it would be between 2:00 and 4:00.

Q. You testified that you saw this Mr. Theriot at Golden Meadow, and I think you said in the Golden Meadow jail, and he told you that he had hit a cow?

A. He did.

Q. When was that? When did he tell you that?

A. Right when I arrived.

Q. Right when you arrived between 2:00 and 4:00?

A. Well, I am not certain if it was between 2:00 and 4:00, but right as soon as I got to Golden Meadow—it has been such a long time, you know.

Q. You are not mistaken about that? You are not mistaken about what Mr. Theriot told you as soon as you arrived at Golden Meadow, that he hit a cow?

A. No, I'm not mistaken about that.

Q. You are positive of that?

A. I am positive.

Q. Did you go out to the scene of the accident that Mr. Theriot was supposed to have had?

[fol. 143] A. Did I go there?

Q. Outside of Golden Meadow, to the scene of an accident that he was supposed to have had?

A. Yes, I went there the following morning. I went the following morning.

Q. The following morning?

A. That was on a Tuesday.

Q. That was on a Tuesday?

A. Yes, sir.

Q. And you came back to Golden Meadow on Tuesday?

A. No, I didn't come back to Golden Meadow on Tuesday.

Q. Maybe I misunderstood you. You mean the following morning, by Monday—

A. Are you talking about the accident that took place on Grand Isle?

Q. Right.

A. And that was on a Sunday?

Q. That was on a Sunday and then it was Monday that you went to Golden Meadow, is that correct?

A. That's right.

Q. Now, is that the day that you went out to the accident?

A. No, it was Tuesday morning. The following morning that we had spoken to Mr. Theriot, I went to the scene of the accident.

Q. You didn't go out that Monday at all?

A. No, I didn't go out there Monday.

[fol. 144] Q. Do you know whether anybody else went there on Monday?

A. No, I don't.

Q. Now, the material that appeared to be hair, who found that under the car?

A. Well, Trooper Milliet and myself, and Red Prudhomme—there were four or five looking under there—but Trooper Milliet was the first one to spot it.

Q. And all of you were under the car at that time?

A. We were around looking one way or another.

Q. Did you see any photographs being taken of the car at that time?

A. Yes, they took some photographs, I believe. I am not certain about the photographs taken, but they talked that they were going to take some.

Q. I'm speaking of the time the car was on the grease rack, did you see any photographs taken?

A. No, I didn't.

Q. You were there all the time?

A. Most of the time.

Q. You didn't see Gautreau take any photographs of the car on the grease rack?

A. No, I couldn't. No, I couldn't say I did.

Q. Did you see Gautreau take any photographs at all of the car?

A. He had taken some photographs, yes. I saw him taken some photographs.

[fol. 145] Q. Those were while the car was sitting on the ground?

A. Yes, sir.

Q. I show you the photographs and ask you if you were present when these photographs were taken, and I'm referring to Gautreau-5, 7, 3, 13, 8 through 13, will you look at those and see if those were the photographs to which you referred? (Photographs to witness.)

A. No, sir, I was not present when these photographs were taken.

Q. You were not?

A. No, sir. I can't tell you when they were taken.

Q. Were there photographs taken when you were present?

A. The ones that were taken during the time I was there was lost or was done away with, or something—I don't know. I was talking to Mr. Gautreau this morning, and he said.—

The Court: Don't say what he said.

By Mr. Hughes:

Q. Those photographs were taken of the car while it was sitting on the grease rack?

A. There was some taken while it was on the grease rack, yes.

Q. After you came to Golden Meadow did you go back to Grand Isle on that day, on Sunday?

A. Yes, I went back.

[fol. 146] Q. With Milliet?

A. Yes, I went with him.

Q. Did you come back to Golden Meadow the same day?

A. Yes, I came back to Golden Meadow the same day.

The Court: Just to keep the record straight, that was a Monday?

The Witness: That was a Monday.

By Mr. Hughes:

Q. Now, where did you find the towel, Mr. Guidry?

A. Between the seat cover and the seat, on the driver's side.

Q. The front or rear seat?

A. The front.

Q. How did you get behind the seat covers?

A. Just passed my hand underneath.

Q. What type seat covers were they?

A. I don't remember, sir.

Q. Are you testifying to cover that you put over the seat that the car comes equipped with, or the upholstery of the automobile itself?

A. I couldn't say.

Q. Well, is your testimony—

A. Well, all I know is that it was between the seat and what I thought to be a seat cover. Between the seat cover [fol. 147] and what I thought to be the seat.

Q. In other words, the car had seat covers on it, what we commonly refer to as seat covers, is that correct?

A. Well, sometimes seat covers are put on as extras, and sometimes they come with the automobile. Isn't that right?

Q. Well, I am trying to distinguish between the natural upholstery of the automobile and some sort of cover that is put on top of that?

A. Sir, I can't make a statement like that. I wouldn't be telling the truth. I have to tell what I think I found and the way I found it.

Q. Well, tell me, please, what you found?

A. Like I say, it was the seat and then the seat cover, what I thought to be a seat cover, and I just reached under there and I found it and I brought it out.

Q. Did you find this towel on the front of the seat, or the back, behind it?

A. The back, sir.

Q. The back?

A. The back of the front seat, on the driver's side.

Q. And there was a cover over the back of the front seat, is that correct?

A. I don't know if the cover went all the way up to the front seat or not. It might have been just the cover from the back seat on down.

[fol. 148] Q. But there was no kind of tear in the upholstery, and the towel was just behind the upholstery?

A. There was no tear.

Q. But there was something over the back of the front seat?

A. There was something over the automobile, yes.

Q. Who was in the car with you when you found that?

A. I was not in the car. I was standing outside and Trooper Milliet was standing directly in the back of me.

Q. Was that found after the car came off the grease rack?

A. After it was lowered, yes. It was still on the grease rack, but it was still lowered to the ground.

Q. And you gave that towel to whom?

A. To Trooper Milliet.

Q. What was the date of your termination as deputy sheriff over in Jefferson Parish? Was that before this accident?

A. A couple of months before, three or four months—I don't remember.

Q. So at the time of this accident you were not a deputy?

A. I was not a deputy.

Q. You were just a private citizen?

A. I was just a private citizen.

Q. Are you and the Defendant Paris Theriot good friends?

A. We have been good friends for years.

Mr. Hughes: That is all.

[fol. 149] Mr. Brumfield: No questions.

The Court: We will take a five minute recess.

(Short recess.)

(After recess.)

The Court: Call your witness.

Mr. Brumfield: We will now call Louis Bradberry.

Louis Bradberry, called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. What is your name?

A. Louis E. Bradberry.

Q. Where do you live?

A. Grand Isle, Louisiana.

Q. Have you lived there all your life?

A. Yes, sir.

Q. How old are you?

A. I will be thirty-six in November 7th.

Q. On December 18th, 1955, which was a Sunday, where were you employed?

[fol. 150] A. I was employed by the Bayou Rigaud Seafood Company.

Q. And did you work in their bar there as a bartender?

A. Yes.

Q. And is that the Fisherman's Bar?

A. That's right.

Q. And you worked there on this Sunday, December 18th, 1955?

A. Yes, sir.

Q. Do you know Mr. Paris Theriot, this man sitting over there (indicating)?

A. I do.

Q. You have known him for a long time?

A. Well, as long as I can remember.

Q. He has been in your bar many times?

A. Off and on, yes.

Q. You have served him drinks before?

A. Yes, sir.

Q. On this day, that is, Sunday, do you remember when he first came in the bar?

A. Well, to tell you the truth, I don't. I mean as far as—I know it was sometime in the afternoon.

Q. Where did he sit there in the bar?

A. Where did he sit?

Q. Yes, where did he sit?

A. He was sitting right about the middle of the bar, I'd say.

[fol. 151] Q. He never left the bar there all the time he was there that afternoon, did he?

Mr. Hughes: That is a leading question, your Honor.

The Court: I sustain the objection.

By Mr. Brumfield:

Q. Did he ever leave the bar after he first came?

A. He did leave the bar to go to the bathroom.

Q. To go to the bathroom?

A. Yes, the rest room, or whatever you want to call it.

Q. Other than that, did he leave?

A. I didn't see him.

Q. When did you leave your—

A. You mean off work?

Q. Yes?

A. In the neighborhood of about 8:00 o'clock.

Q. Did Mr. Theriot leave before you quit work?

A. Mr. Theriot left before I did.

Q. Do you remember what time you left?

A. I would say around 7:30, as far as I know, as close as I can remember.

Q. During the time that you were there were there any other bartenders on duty at that time?

A. Well, there is—there was a guy that always helps me, [fol. 152] one of the bosses.

Q. What's his name?

A. Mr. Arcent Adams, Harris Adams.

Q. You say Harris Adams?

A. Yes, sir.

Q. Was he there also during this time?

A. He was, off and on.

Q. You were there all of the time?

A. I was there from morning until about 8:00.

Q. Mr. Bradberry, how many drinks of intoxicating liquor did Mr. Paris Theriot have that Sunday afternoon while he was there?

A. To the best of my knowledge. I would say around eight or ten.

Q. Did you serve him yourself?

A. Well, that was between me and Mr. Arcent. I don't know just—

Q. But you were there when they were served?

A. I was there. That's what I seen him have.

Q. Of course, he could have had more and you not seen him?

A. That's right. That I did see.

Q. Who paid for those drinks? Do you remember?

A. Mr. Theriot paid for some, and there was another couple.

Q. What were their names?

A. I don't know, sir.

[fol. 153] Q. Was it Mr. & Mrs. Fink?

A. Mr. & Mrs. Fink? No, I don't think—

Q. It wasn't them?

A. It wasn't them.

Q. It was another couple?

A. It was another couple.

Q. Had they ever been there before?

A. No, that was the first time I seen them.

Q. Would you describe them? When you said "a couple", I assume that you meant a man and a lady?

A. A lady and a gentleman, I seen them.

Q. Will you describe the lady?

A. Well, she was kind of a small woman, and I would say middle-aged.

Q. Were they drinking?

A. They were drinking, yes.

Q. Did Mr. Theriot have any drinks with them?

A. Well, I think I served him one or two while the couple was there.

Q. And then did they leave before or after Mr. Theriot?

A. I can't say. I don't remember which left first.

Mr. Brumfield: That is all. Thank you.

Answer the questions of Mr. Hughes.

[fol. 154] Cross examination.

By Mr. Hughes:

Q. Mr. Bradberry, you don't recall what time you first saw Mr. Theriot there?

A. No, I don't.

Q. Do you recall about what time he left?

A. I don't.

Q. Do you know how many hours he was there?

A. Like I said before, it was sometime in the afternoon and I don't recall the time.

Q. Do you remember how many drinks he had or are you estimating?

A. I am estimating that.

Q. Do you recall serving Mr. Theriot that day?

A. I did.

Q. Did Mr. Theriot appear to be intoxicated in any way?

A. No, sir.

Q. As far as you can tell, he was perfectly sober and in control of his senses?

A. In control of his mind and senses, yes.

Q. What time did you leave?

A. I left around the neighborhood of 7:30 or 8:00 o'clock.

Q. And you drive an automobile?

A. No, sir.

Q. How did you leave? How did you go home from work?

[fol. 155] A. I don't remember who I left with, because I usually don't leave with the same guy every night. I

usually leave with the first ride I get, and that night, in particular, I don't remember who I left with.

Q. But you left in an automobile, did you not?

A. I did.

Q. And you left about 8:00 o'clock?

A. About, yes.

Q. After Mr. Theriot?

A. Yes, sir.

Q. Now, do you know where the body of Mr. Mercer was found?

A. Well, as I was coming back to work the next day, I seen where he was found.

Q. When you left the night before, around 8:00 o'clock did you pass that place?

A. Yes, I passed it.

Q. Did you see anything unusual?

A. No, sir.

Q. Did you see a body lying on the side of the road?

A. No, sir.

Q. The lights on the automobile you were in were working all right?

A. They were working fine.

Q. Were you looking ahead of you?

A. I was looking on the road, yes.

[fol. 156] Q. And you did not see a body or anything unusual on the side of the road?

A. I didn't see nothing unusual on the side of the road.

Q. As far as you know there was nothing there when you passed the night before?

A. That's right.

Q. And Mr. Theriot had already left?

A. Yes, sir.

Q. Were there many other people there in the Fishermen's Restaurant?

A. Well, there was, on a Sunday like that, the tourists, but usually they leave early—I mean in the afternoon, so at that time, during the night, there's not too many people, but there was a few people on and off during the afternoon, the people at the bar coming in and out.

Q. Were you ever questioned by any deputy or any officials about what you saw that night?

A. Yes, I was.

Q. Were you questioned about Mr. Theriot's actions, or about what you had seen, or whether you had seen anything on the road?

A. I was questioned about the whole accident, what I knew about Mr. Theriot, and if I had seen something unusual on the road, and about the same questions you have been asking me, sir.

[fol. 157] Q. Who questioned you?

A. Douglas Milliet at the time was a deputy sheriff.

Mr. Hughes: That is all.

Redirect examination.

By Mr. Brumfield:

Q. Did you give Milliet a statement? Didn't you?

A. Yes, sir.

Q. I believe in that statement you said that you had served Mr. Theriot ten or fifteen Scotch and waters?

A. Well, I mean as close as I could get it, yes. That was as close as I could remember at the time.

Q. I show you this statement (document to witness), and when you were riding along you weren't looking for Mr. Mercer, were you?

A. How's that?

Q. I say when you were riding along that road, you were not looking for Mr. Mercer, were you?

A. I wouldn't know the man if I'd see him, sir.

Mr. Brumfield: That is all.

Thank you very much.

Mr. Hughes: No questions.

[fol. 158] The Court: You are excused.

Mr. Brumfield: We will now call Deputy Sheriff Gilbert Duet.

GILBERT DUET, called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Would you please state your full name, sir?
A. Gilbert Duet.
Q. Where do you live, Mr. Duet?
A. Golden Meadow, Louisiana.
Q. And what Parish is that in?
A. Lafourche Parish.
Q. And are you an official of that Parish?
A. I am a deputy sheriff of Lafourche Parish.
Q. How long have you been a deputy sheriff?
A. Since 1934, except for about six years.
Q. And you live right in Golden Meadow?
A. Yes, sir.
Q. Do you know Mr. Paris Theriot?
A. Yes, sir.
Q. Did you receive a call with reference to an investigation that some deputy sheriff wanted to make in your Parish, or in the town of Golden Meadow?
A. Yes, sir.
[fol. 159] Q. Who contacted you?
A. Three deputies from Jefferson Parish.
Q. Was Officer Prudhomme one of those officers?
A. Yes, sir.
Q. And what was the request?
A. They called me. I was at my house, and they called me to meet them at the Town Hall in Golden Meadow. When I got there, well, they explained me what it was, so I asked them, I told them, I would have to contact my sheriff in Thibodaux before I can make any move, so he tells me to go ahead on and help the boys while they are working in the Parish.
Q. And who was that sheriff?
A. Eddie St. Marie.
Q. He told you to go ahead and—
A. To go ahead on with the other deputies.

Q. Did you cooperate with these officers?

A. Yes, sir.

Q. And were you there when the interrogation was made on Mr. Theriot?

A. Yes, sir.

Q. Who conducted the investigation?

A. One of the deputies from Jefferson Parish—I don't know which one it was. I know them when I see them, but I don't know which one it was.

Q. But he has been here today testifying?

[fol. 160] A. Yes, sir.

Q. And he has been in civilian clothes, Prudhomme?

A. It would be Prudhomme—it could be.

Q. Well, did you take any part in the investigation yourself?

A. Well, I was with them mostly all the time.

Q. Were you there when the scrapings were taken from the car?

A. Yes, sir.

Q. What scrapings were taken? Do you recall?

A. Well, they took, that I seen, some kind of a powder that the car had been washed, what he had been using to wash the car with, to wash the car with it I don't know how you call that kind of powder. And they picked up some stuff underneath the car, and they said it was hair, and it looked to me like it was hair, but I don't know if it was hair or not.

Q. Yes, and what else?

A. And I also was there when they inspected the front end of the car, and that was on one of the headlights, the rim around the sealed beam was missing, and the part of the hood was bumped up.

Q. You say part of the hood?

A. Part of the hood had bumps on it. But I stayed with them and they done all the work, and they done the talking, and I was with them all of that time.

Q. Did you hear Mr. Theriot deny that he had his car washed that morning?

[fol. 161] A. Yes. He said that he hadn't washed it.

Q. That he had not washed it?

A. That is right.

Q. How long did this investigation, or interrogation take place there in Golden Meadow?

A. Well, they called me up. They called me up around, I would say 2:00 o'clock in the afternoon. It was on a Monday. And we stayed at the Town Hall and up to the garage where we brought the car and had it raised up with a what you call it, and with all the talking that went on, the questions that was asked Mr. Theriot, I would say that we stayed there until maybe 10:30 or 11:00 o'clock that night.

Q. Did you go out on the scene there on the Highway 308, or whatever the number of the highway is, where Mr. Theriot said that he had had a collision with another truck?

A. Yes, I went.

Q. Did you go out there?

A. Yes, sir.

Q. Did you see any evidence of any car running off the highway?

A. Yes. Mr. Theriot showed me.

Q. He showed me?

A. Yes, sir.

Q. Did he say whether or not he was stuck in this dirt or mud before he could get out?

[fol. 162] A. No, he said that he pulled his car off after that, that he almost had a collision with a truck, and he said he pulled the car after.

Q. He said he pulled it off after he almost had the collision?

A. That's right.

Q. Did one of these officers there, the one who was in charge of the investigation, do you know whether or not that he kept these scrapings that you described, or which one of the officers did that? Do you know?

A. Well, I don't know. One of them took it with him, but I don't know who took it.

Q. And did this same officer go out at the scene that you described there with you?

A. Yes.

Q. And how did you say that Mr. Theriot pointed out to you where he went off the road?

A. Well, Mr. Theriot was telling us about his car, that it had been damaged on the front end, that he was going up the road on Highway 308, towards Raceland from Golden Meadow, and he almost had an accident with a truck. And, as one of the deputies asked him if he would be willing to show us where he—where this took place, he said that it was a piece of lumber that fell on the hood of his car, and it was a piece about, I would say ten inches long, and about 8 x 8, square.

[fol. 163] Q. Did it have a spike or a nail?

A. No, it was a piece of wood, and it was square.

Q. Did it have a spike or a nail on one end?

A. It had a nail, that's right. So, he brought us to the place and showed us exactly where his car had went off the highway, and he went and looked in the place, and he walked straight to that piece of lumber, where it was there in the grass.

Q. And did anyone pick up this lumber and keep it, or do you know?

A. Yes, one of the deputies picked it up.

Q. You don't know which one?

A. I don't know.

Q. Other than what you have related, did you go back to the Town Hall after that?

A. Yes, sir.

Q. And you say that it broke up, the investigation end of it, around 10:00 or 11:00 o'clock that night?

A. I'm not too sure. I believe it was around 10:00, 10:30 something like that.

Mr. Brumfield: That is all.

Cross examination.

By Mr. Hughes:

Q. Mr. Duet, when you went out to the scene of that acci-
[fol. 164] dent on Highway 308—is that the number of the highway?

A. Yes, sir.

Q. Was that in the daytime or dark?

A. Daytime.

Q. That was Monday?

A. Yes, that was Monday.

Q. Was Deputy Milliet there?

A. I don't know. I know Prudhomme was there, and Gautreau was there. There was three of them. I don't remember the other.

Q. Do you recall whether Folse was there, a State Trooper?

A. You mean from the State Police?

Q. Yes?

A. No, sir, he was not there.

Q. And one of the deputies took this piece of wood?

A. That is correct.

Q. Do you recall them taking any scrapings off that nail?

A. Yes, sir.

Q. And what did they do with the scrapings?

A. They put them in a piece of paper on some small envelope they had.

Q. And they took the scrapings and the piece of wood? Is that correct?

A. Yes, sir.

Q. Did Mr. Theriot tell you that he had hit a cow?

[fol. 165] A. No, sir.

Q. Did he say in your presence that he had struck a cow?

A. No, sir.

Q. Did you hear him tell Deputy Milliet that he had struck a cow?

A. No, sir.

Mr. Hughes: That is all.

Mr. Brumfield: No questions.

Thank you very much. I would like for you to remain in there, if you will.

JOHN W. MILLER called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Will you state your name?
A. John Wilton Miller.
Q. Where do you live?
A. My home is Natalia, Texas.
Q. What kind of work do you do?
A. Pipe line, construction.
Q. Did you know Byrd Mercer?
A. Yes, sir.
[fol. 166] Q. How long have you known him?
A. I would say four or five months before this.
Q. Had you worked with him?
A. Yes, sir.
Q. Were you working on the same job with him at the time he was killed?
A. Yes, sir.
Q. When did you last see him alive?
A. Around 7:00 o'clock that afternoon.
Q. Where was he?
A. At the dock there, at the store.
Q. And did you see him leave the dock and the store?
A. No, sir, I didn't actually see him leave. I saw him maybe minutes before he left.
Q. And then you were there when he did leave?
A. Yes, sir.
Q. Was he walking?
A. I couldn't tell you.
Q. And about what time was that?
A. About 7:00. Around 7:00.
Q. And did he leave alone?
A. As far as I know, he did.
Q. Do you know his wife, Mrs. Mercer here (indicating)?
A. Yes, sir.
Q. Did you work with him that Sunday? Were you out [fol. 167] on the job with him?

A. Yes, sir.

Q. What time did you all get off that day?

A. We usually quit around fifteen till five, and we had an hour boat ride coming in, something like that, so usually we get in about 6:00, 6:30.

Q. And who else was around at the time with you? Were there other employees, co-workers there with him? Do you remember any of them?

A. Well, we always landed there, and we all stopped there and—

Q. How did you get out from the job in the Gulf? Was it in a boat?

A. On a boat, speed boat.

Q. Well, when did you learn of the death of Mr. Mercer?

A. The next morning.

Q. Where were you when you heard it?

A. It was on the job.

Q. Did you go to the scene, or anything?

A. Yes, I was there at the scene.

Q. When did you go there?

A. Just as quick as I could get back in. It was, I guess, around 7:30-8:00 o'clock that morning, something like that.

Q. And did you identify the body as being—

A. He had already been identified.

Q. Did you see it yourself?

[fol. 168] A. Yes, I actually saw him.

Q. And it was the body of Mr. Mercer?

A. Yes, sir.

Q. Did you see it while it was there on the shoulder of the road?

A. Yes, sir.

Q. What side of the road was the body on?

A. On the right side, coming towards the bridge.

Q. And that would be going away from the Island, on the right?

A. Coming from the docks, on the right.

Q. Do you know where Mr. Mercer lived?

A. Yes, sir.

Q. Where did he live?

A. In a trailer court.

Q. Where was the trailer park located with reference to the dock where he started out from?

A. I would say close to four miles, something like that, to the docks. That is approximately, because really I don't know how far.

Q. And did you say that you saw Mr. Mercer there at the store?

A. That afternoon that we came in, yes.

Q. And that was around 7:00 o'clock, I believe you said?

A. Yes, sir.

[fol. 169] Q. How far is that store from where Mr. Mercer lived?

A. I would say it is approximately three to five miles.

Q. You just don't know?

A. I just don't know.

Q. What kind of man was Byrd Mercer? Describe Mercer? What kind of man was he?

A. He was a nice guy. He never did give any trouble, or anything. He was always willing to—you know I mean he would always help—

Q. Did he like his work?

A. Yes, he did.

Q. Was he a good worker?

A. Yes, sir.

Mr. Brumfield: That is all.

You may answer the questions of Mr. Hughes.

Cross examination.

By Mr. Hughes:

Q. Mr. Miller, did I understand you to testify that you came in from the rig with Mr. Mercer, in a speed boat?

A. Of the night he was killed?

Q. Yes?

A. Yes, sir.

Q. And you landed on the dock?

A. Yes, sir.

[fol. 170] Q. Is that the last time you saw him, at the dock?

A. I saw him in the store.

Q. He went in the store after he landed?

A. Yes, sir.

Q. Did you leave first or did he leave first?

A. He undoubtedly left first. I didn't leave until around 8:00 or 8:30. That's when I left.

Q. You didn't see him leave?

A. No. He was going to ride with us, and then when we got ready to go, he wasn't there.

Q. So you don't know when he left?

A. I talked to him, oh, around 7.00, and he said he was going. I said, okeh, and I said that we were going, and when I turned around and looked, just a few minutes later, he was gone.

Q. So you don't know whether he left alone or not?

A. No, sir.

Q. Because you didn't see him leave?

A. No, sir.

Q. Did you work the same shift?

A. Yes, sir.

Q. How did Mr. Mercer usually get home?

A. He usually rode home with one of the—well, you know, with one of his co-workers out there. At the time he had been riding with the foreman and myself.

[fol. 171] Q. Do you know why he did not ride with you and the foreman this particular evening?

A. No, sir.

Q. Now, on your way home did you pass the place where his body was found the next day?

A. Yes, sir.

Q. Did you see anything unusual?

A. It was raining and foggy at the time.

Q. You didn't see anything on the side of the road?

A. No, I wasn't looking. I didn't see anything.

Q. Were you in a grocery store or a restaurant or a barroom with Mr. Mercer?

A. It is all combined.

Q. All combined?

A. Yes, sir.

Q. Well, was it in a different department?

A. Well, it is all combined. It is a big door there about the size of that that separates the grocery store and the bar (indicating).

Q. What section were you in? Were you in the grocery or the bar?

A. I had been in both.

Q. That particular night?

A. I had been in both. I had went and bought something and I was drinking my drink out of the bottle.

[fol. 172] Mr. Hughes: That is all.

Redirect examination.

By Mr. Brumfield:

Q. You say that the weather on that night was rainy and foggy?

A. At the time we left the bar it was.

Mr. Brumfield: That is all.

Mr. Hughes: No questions.

The Court: You may be excused.

Mr. Brumfield: We now would like to call Mrs. Wanda Mercer.

Mrs. Wanda Mercer called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Brumfield:

Q. Will you state your maiden name? I mean your name before you were married?

A. Wanda Lane.

Q. Wanda what?

A. Lane.

[fol. 173] Q. Is that L-A-N-E?

A. Yes, sir.

Q. How old are you, Wanda?

A. Thirty-two.

Q. And when were you married to Mercer?

A. May 15th, 1948.

Q. May 15th, 1948?

A. Yes, sir.
Q. Where were you married?
A. We were married Taos, New Mexico.
Q. And did you live with him as his wife up until the time of his death?
A. Yes, I did.
Q. Were there any children born?
A. No, sir, no children.
Q. What kind of work did he follow? What did he do?
A. Well, it was mostly construction work.
Q. On December 18th, 1955, and prior thereto, what kind of work was he doing?
A. He was with the pipe line.
Q. And was he laying a pipe line out in the Gulf?
A. Yes, sir.
Q. Where were you and your husband living?
A. We were in a trailer court.
Q. Where was the trailer court located?
[fol. 174] A. Well, it was about—it was right in town, I mean in Grand Isle there.
Q. In Grand Isle?
A. Yes, sir.
Q. And you had a trailer?
A. Yes, sir.
Q. How long ago had you and he been down there?
A. In Grand Isle?
Q. Yes?
A. Well, we were going on almost three months.
Q. Doing the same type of work?
A. Yes, sir.
Q. You said the same type of work?
A. Yes, sir.
Q. How would he get to his job when he would leave the trailer?
A. Well, he usually rode with the foreman.
Q. They had a pool, and they picked him up?
A. Yes, he had a pick-up.
Q. Where did the foreman live?
A. He lived about five or six blocks down from us there.
Q. And he picked him up in the morning?
A. Yes, sir.

Q. About what time would he go to work in the morning?

A. Oh, I would say about six, around six or something like that.

[fol. 175] Q. And what time would he get in from his work?

A. He was usually in about seven, six-thirty or seven.

Q. And how would he get back home, back to the trailer?

A. Well, he usually rode with the foreman or with one of his co-workers there.

Q. And would he work sometimes longer than the eight-hour shift?

A. Oh, yes, quite a few times.

Q. Did he come home—first, did he leave for work on Sunday the 18th of December, 1955?

A. Yes, he did.

Q. What time did he leave?

A. He left us around six, or it might have been a little before six.

Q. Who did he ride with?

A. With Mr. Branner, the foreman.

Q. Did he come home that night at the usual time, that Sunday?

A. No, sir, he didn't.

Q. And what did you think was the reason that he didn't come home? Did you get a message?

A. No, I didn't. They had worked, you know, late sometimes and I just thought that maybe they were working overtime, you know.

Q. When did you learn of this unfortunate accident?

[fol. 176] A. It was the next morning.

Q. Do you know about what time it was?

A. Well, no. No, sir, not for sure, but it was about 7:00 7:30, something like that.

Q. Do you know who it was that broke the news to you?

A. Well, the foreman's wife, Mrs. Miller, came and got me.

Q. And that was the wife of the gentleman that just testified?

A. And Mrs. Miller, yes.

Q. And that was the wife of the gentleman who just testified?

A. Yes, sir.
Q. Did you love your husband?
A. Very much.
Q. Did you work any after his death?
A. Yes, I had to. I had to work.
Q. Did you remarry?
A. Yes, I remarried just last May.
Q. How long a time elapsed from the death of your husband?
A. Well, almost a year and a half.
Q. And what is your present husband's name now?
A. Eugene Herron.
Q. Was he a friend of your husband's?
A. Yes, he knew Byrd for a long time. He would visit us, and everything. They were good friends.
Q. Do you miss your husband Byrd Mercer now?
[fol. 177] A. Sure I miss him. I always will. He was my first love. You just don't forget things like that.

Mr. Brumfield: That is all. Answer Mr. Hughes' questions.

Cross examination.

By Mr. Hughes:

Q. Mrs. Herron, the date of your remarriage, was it May 4th, 1957?
A. Yes, sir.

Mr. Hughes: That is all.

Redirect examination.

By Mr. Brumfield:

Q. At the time your husband was killed, what was he earning?
A. It was about $150.00 a week.
Q. About $150.00 a week?
A. Yes, sir.

Mr. Brumfield: That is all. Thank you very much.
Mr. Hughes: No questions.

PLAINTIFF RESTS.

Mr. Brumfield: If it please the Court, the Plaintiff rests, [fol. 178] with the right of rebuttal.

Mr. Hughes: If the Court please, I would like to make a motion out of the presence of the Jury.

The Court: Let the Jury be excused into the corridor.

(The Jury withdraws from the Courtroom.)

Mr. Hughes: If the Court pleases, the Defendant moves for a directed verdict on the theory that neither the time, the place, nor the manner that the decedent met his death has been proven. The only facts before the Court at the point are that the decedent's body was found alongside of the road the day following the time my client's automobile and a lot of other automobiles passed the scene of the accident. I don't think, if the Court pleases, that there is sufficient evidence to warrant submitting the case to the Jury.

The Court: I overrule the motion at this time. You may renew your motion at the proper time, as the case goes on. Call the Jury back.

(The Jury returns into the Courtroom.)

The Court: Call your witness.

[fol. 179] Mr. Hughes: We will now call the Defendant, Paris Theriot.

PARIS THERIOT called as a witness at the instance of the Defendant, having previously been sworn, was examined and testified as follows:

Cross examination.

By Mr. Hughes:

Q. Mr. Theriot, on December 18th, 1955, you were a part owner of Theriot Motors, were you not?

A. Yes, sir.

Q. And Theriot Motors was an Oldsmobile and Chevrolet dealer, was it not?

A. Yes.

Q. And on the morning of December 19th your company was open, wasn't it, the motor company, open for business?

A. The 19th?

The 19th? Yes, that was on a Monday, yes, sir.

Mr. Brumfield: I ask that Counsel not lead the witness.

The Court: Don't lead the witness.

By Mr. Hughes:

Q. On December 18th, December 19th, 1955 did you have seat covers on your automobile?

A. No, you don't put seat covers on this car.

Q. Let me ask you, Mr. Theriot, is English your native language? Do you speak English all the time?

[fol. 180] A. Not all the time, no.

Q. What do you speak?

A. I speak French most of the time.

Q. Did you make a statement to Mr. Milliet, or to Mr. Guidry, or to anyone else, that you had struck a cow with your automobile?

A. No, sir.

Q. Or any other type of animal?

A. No, nobody.

Q. On the night of December 18th, Mr. Theriot, after you left the Fisherman's Restaurant and Bar, did you pass any cars on the road?

A. I'll tell you, I passed one, a truck that belonged to Maurice Terrebonne. He left right before me. He owned the restaurant—the restaurant, the store, and the bar is all combined together, you see, and he left. When he left with his truck, a panel truck, 1-ton panel truck, I left right behind him, you see.

Q. Leaving the Fisherman's Bar and Restaurant, and going towards Golden Meadow, would you have any turns in the road?

A. Yes, when you leave the bar, the restaurant, you take a little road for about two-hundred feet.

Q. Is that the road the restaurant is on?

A. You see, the road and the restaurant and the bar, they are on a big lot—I figure it's maybe two-hundred feet

[fol. 181] square, you see, and about two-hundred feet you turn left.

Q. Is that a right-angle turn?

A. Yes, you turn right. That's right.

Q. What direction do you turn, Mr. Theriot?

A. You're going west, you see, and that's where you turn left, about two-hundred feet after you leave the place, then you go for about six-hundred feet, and you've got another little curve—not too much—about—

Q. Well, which way does that curve go?

A. It turns right, and you go for about—well, say about four or five blocks and you turn right again, and right straight all the way to Grand Isle.

Q. Now, do you know where, as you later found out, where Mr. Mercer's body was found?

A. I don't know. They tell me it was about a mile.

Mr. Brumfield: I object, your Honor.

The Court: Has the place been pointed out to you?

The Witness: No, sir.

The Court: He said "No, sir."

By Mr. Hughes:

Q. Where did you pass Mr. Terrebonne?

[fol. 182] A. Well, I passed Mr. Terrebonne about, when you turn right in that straight road, so I would say about five or six blocks from that curve there, right by the Humble house—they have a gas house on the left and I passed him right there.

Q. Was it before you reached the Humble house?

A. Oh, yes.

Q. At the time you reached the Humble house you were ahead of him, Mr. Theriot, is that correct?

A. You mean that little house on the side that I talked to you about? Right about that, around that house, and I can't tell you exactly, but right before I got to it, or right even with it.

Q. Mr. Theriot, what were the relationships between you and Douglas Milliet in December of 1955?

A. In what way you mean?

Q. Were you friendly?

A. No, we are not friendly.

Q. Had you ever had any trouble with Milliet?

A. Well, I didn't have no trouble with him but he had something against me.

Q. How do you know he had something against you?

A. Well, because when Terrebonne and Adams went in business, they come and see me to help them out, you see, and I endorsed the note at the bank so that they can start in business. That is the same kind of business like his [fol. 183] daddy's got, and that's why he got mad at me. He told me he was going to get even with me for that.

Juror Number Eight: Will you turn this way, please, so we can hear.

By Mr. Hughes:

Q. Mr. Theriot, you referred to somebody's daddy in your answer. Whose daddy did you mean?

A. Milliet's daddy.

Q. And that is the same Milliet who is the deputy sheriff?

A. Yes, that is his son.

Q. Did Milliet, the deputy, threaten you?

A. Well, he tell me that when they came to the Town Hall. He came there. He was mad, and he said, "I've got you now. I told you I was going to get even with you." That's what he told me, and he didn't threaten me but he started fussing, and one of the deputies tell him, but I don't know which one, "Listen, we don't want no trouble down here. You go outside." That is all we talked about between me and him.

Q. When the deputies approached you the day following the accident did you cooperate with them in every way that you could?

A. Yes, sir.

Q. Mr. Theriot, did your automobile strike Mercer?

A. What's that?

Q. Did your automobile run into Mercer after you left [fol. 184] the Fisherman's Bar the night December 18th?

A. No, sir.

Q. You are positive?

A. I am sure I didn't touch nothing.

Mr. Hughes: That is all. Answer Mr. Brumfield's.

Cross examination.

By Mr. Brumfield:

Q. How did you say the weather was that night when you left the Fisherman's Bar?

A. It was drizzling a little bit.

Q. Was it foggy?

A. No, it was not foggy, but just a little bit rain and fog.

Q. Was it dark?

A. Yes, it was dark. The way it was, it was about 7:45 or—

Q. Well, did you have your lights on bright or on dim?

A. Well, I'll tell you, you put them down to dim, if it's a car coming, but then you've got to change your lights.

Q. Well, how did you have them on when you were driving?

A. Well, when a car is coming—when no car is coming I got them bright, but when I meet a car I pull them down, dim.

Q. Did you meet any cars coming towards you?

A. Well, you meet cars all the time.

Q. I'm talking about between the time you left the Fisherman's Bar up to the time you got to the bridge?

[fol. 185] A. I'll tell you, that's several miles long, and you're bound to meet some cars. I can't tell you how many I met or if I didn't meet any.

Q. Do you know whether or not you did, or don't you remember?

A. What?

Q. Whether or not you met any cars coming in the opposite direction?

A. I can't remember, but I'm bound to meet some. You meet some cars all the time, and you pass them and you meet some.

Q. You mentioned the fact that you had passed a car. Did you pass more than one?

A. I passed that little truck there.

Q. Well, did you pass anybody else?

A. No, I didn't pass anybody else after that.

Q. You didn't pass anybody else after that?

A. I might have met someone coming, or going past, but I didn't pass no car.

Q. How fast were you driving along that road that night?

A. Well, you see, on the Island you don't drive more than about twenty-five or thirty miles.

Q. Well, how fast were you driving that night?

A. About thirty-five miles—between twenty-five and thirty-five.

Q. How fast were you driving after you crossed the bridge?

A. After you cross the bridge you have allowance to [fol. 186] sixty miles an hour.

Q. Is that how fast you were driving?

A. Well, I drive between 50-60, the way I drive all the time.

Q. Even at night, when it is on a wet highway?

A. On the highway. It didn't rain enough to mess up anything.

Q. You were driving around fifty-five or sixty along the highway after you crossed the bridge?

A. You've got to slow up sometime, you can't drive any fifty-five, sixty—

Q. I'm talking about on this night, is that what you did?

A. Well, I slowed for trucks or cars, if I met a car, I slowed down and put my dim on.

Q. Mr. Theriot, did you bribe anybody or pay anybody off to quash this thing?

A. Who? Me? I don't do that for nobody. I am not guilty. I am not going to do that for nobody. Even if I'd be guilty, I wouldn't do that.

Q. You wouldn't do that even if you were guilty?

A. No, sir.

Q. Did you go talk to any friends, or any political powers that be about this trouble that you were in for killing Mercer?

A. I didn't talk to nobody. I didn't even talk to my wife about it.

[fol. 187] Q. You didn't even mention it to your wife?

A. No.

Q. You didn't tell your wife what happened to you and about this interrogation and investigation going on around there that Monday? You didn't even tell your wife?

A. No, sir.

Q. Is that right?

A. Yes.

Q. Is that right, Mr. Theriot?

A. Yes. That's my business.

Q. That is your business?

A. I ain't going to tell my wife nothing when I'm in trouble for her to worry about something. If she wants to find out something like that, she finds it out from somebody else.

Q. You never have had any trouble with Mr. Guidry, have you?

A. No.

Q. Aren't you all good friends?

A. Yes, I figure we're friends. I don't know.

Q. You don't have anything against him, have you?

A. I don't have anything against him, I don't know why he came down here and checked my car.

Q. You don't know any reason why he has anything against you?

A. Oh, yes, maybe he can be against me for one thing, and that is all under politics, because he lost his job, but [fol. 188] that's not my fault. I work in Golden Meadow, in Lafourche Parish.

Q. Did you have anything to do with Mr. Milliet losing his job?

A. No, sir, I had nothing to do with that.

Q. Did you make a contribution in the sheriff's race over here in Jefferson Parish?

A. Not me.

Q. Are you positive about that?

A. Yes. I gave Mr. Terrebonne a dollar for a card membership. He asked me for the dollar, and I gave him a dollar for the card. Why, I didn't even read the card.

Q. Who was Mr. Terrebonne for?

A. Leo Terrebonne.

Q. Who was he for in the race?

A. I don't know. I don't play politics.

Q. You gave that dollar contribution for the sheriff's race?

A. After the election. He sell you the card, gave you a card for membership, but I don't know what that is.

Q. Do you deny that you gave any money at all to either one of the candidates running for sheriff in the sheriff's election of January, 1956, in Jefferson Parish?

A. Yes, I deny that.

Q. Did your brother give any?

A. I don't know nothing about my brother's business.

[fol. 189] Q. You usually left a lot of your business to your brother, didn't you?

A. That's different. That's not business. That's plain politics.

Q. You don't know whether he did or not?

A. I don't know.

Q. Did you vote in Jefferson Parish?

A. I vote in Lafourche.

Q. You vote in Lafourche?

A. Yes, sir.

Mr. Brumfield: That is all, Mr. Theriot.

Redirect examination.

By Mr. Hughes:

Q. Mr. Theriot, one last question. Was any criminal charge of any kind made against you as a result of this accident?

A. Nothing at all.

Mr. Hughes: That is all.

Mr. Brumfield: No questions.

Mr. Hughes: I would now like to call Maurice Terrebonne.

MAURICE TERREBONNE called as a witness at the instance of [fol. 190] the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hughes:

Q. Mr. Terrebonne, what is your occupation?
A. I'm a restaurant owner. I am in the restaurant business.
Q. What is the name of your restaurant?
A. The Fisherman's Restaurant.

The Court: Keep your voice up so the Jury can hear you without straining.
The Witness: Yes, sir.

By Mr. Hughes:

Q. Where is it located?
A. At Bayou Rigaud Seafood Company.
Q. Is that at Grand Isle?
A. Yes, sir.
Q. Were you down there on December 18th, 1955?
A. Yes, sir.
Q. Did you see Mr. Paris Theriot down there that evening?
A. I saw him once that day, sir.
Q. Where did you see him?
A. Well, it was approximately about an hour or so before I closed my restaurant. I was going to my warehouse, which is located behind the bar, and he was sitting at the bar.
[fol. 191] Q. Approximately what time was that?
A. I would say about 6:00.
Q. Did you speak to him?
A. I just told him hello, as I went behind the bar to go to my warehouse.
Q. Did he appear to be sober or was he under the influence—
A. To the best of my knowledge he was.

Q. He was what?

A. Sober.

Q. What time did you leave the Fisherman's Bar & Restaurant that evening?

A. Between 7:30 and 8:00 o'clock.

Q. What kind of a car do you have?

A. I had a panel truck at that time, sir, a '54 Model Chevrolet.

Q. Will you describe that truck? Is it open or closed?

A. It is a closed-in truck, sir, with one seat in front.

Q. Who was in the front seat?

A. Myself.

Q. And was there anyone in the back of the truck?

A. Yes, there was one or two of my employees, and a couple of little kids that were at the restaurant at the time, my relatives, and my wife and my mother-in-law sitting in the back end of the truck.

Q. After you left your place of business, did any auto- [fol. 192] mobile pass you?

A. Yes, sir.

Q. Do you know whose automobile passed you?

A. Mr. Theriot's.

Q. And that was Mr. Paris Theriot?

A. Yes, sir.

Q. And you know his automobile when you see it?

A. Yes, sir.

Q. Do you know, or have you had pointed out to you where Mr. Mercer's body was found?

A. Well, I believe, sir, to the best of my knowledge, it was the body—the body had been found between the gas house and the Humble road.

Q. Did you pass the scene on the 19th?

A. Well, I come back from work that next morning—

Q. Did you see people gathered around there?

A. No, sir. I come there between 4:00 and 4:30 to open up my restaurant.

Q. Is that road curved or straight there?

A. Well, from my restaurant I have to make two turns before I can hit the straight road.

Q. I'm speaking of the road, the point of the road where the body was found, was that a straight road or a curve?

A. It is a straight road.

Q. And where would you place it, in relation to what [fol. 193] landmarks? Where would you place it in relation to any buildings or structures down there?

A. I don't believe I got you right.

Q. Is there a Humble building down there?

A. Yes, sir. There was a Grand Isle Hotel building, and then there was another house next door to it, and then there is a Humble Gas house, and there's a camp by the name of Hi Tiger, all in the same side of the road, on the left-hand side, towards the beach.

Q. And about where in relation to any of those buildings where was Mr. Mercer's body found?

A. Between the Humble Gas house and the Humble road used to go to the Humble building.

Q. When Mr. Theriot passed you the night of the 18th, had you reached the Humble Gas house?

A. No, sir.

Q. In other words, he passed you before you reached the scene where the body was found? Is that correct?

A. Yes, sir.

Q. Did you have his car in view after he passed you, or did he disappear from sight?

A. No, sir, I still had his car in view.

Q. Approximately how fast were you going?

A. I was going approximately about twenty-five miles an hour.

[fol. 194] Q. After he passed you, you could see his car, his tail-lights?

A. Yes, sir.

Q. Could you see his car at the time it passed the point where this body was found?

A. Yes, sir.

Q. Did you see his stop light go on?

A. No, sir.

Q. Did you see the car swerve?

A. No, sir.

Q. Or stop?

A. No, sir.

Q. Or leave the road?

A. No, sir.

Q. Or bump anything?

A. No, sir.

Q. Did you notice anything at all unusual about the operation of that car ahead of you?

A. No, sir.

Q. Did you pass any automobile before you got to your home?

A. No, sir, I didn't pass any automobile except, with the exception, after I passed Humble road, there was a few cars that passed me.

Q. Some cars passed you?

A. Yes.

[fol. 195] Q. How many cars passed you?

A. About one or two. I don't recall the exact amount.

Q. After Mr. Theriot passed you?

A. Yes, sir.

Q. Did those cars pass you before or after you reached the scene where the body was found?

A. After, sir.

Q. When you passed the point where the body was found, did you see anything unusual? Did you see a body, or a coat, or a lunch pail, or anything alongside of the road?

A. No, sir.

Q. How was the weather?

A. It was raining, sir.

Q. Was it raining hard?

A. It was drizzling.

Mr. Hughes: That is all.

Answer Mr. Brumfield's questions.

Cross examination.

By Mr. Brumfield:

Q. Mr. Terrebonne, how long have you been knowing Mr. Paris Theriot?

A. I have been knowing him quite a few years.

Q. How many years?

A. Well, I don't exactly know now because I have been [fol. 196] away for about nine or ten years, away from Grand Isle.

Q. Where have you been?
A. In the Service, and working for oil companies.
Q. How long have you been in business down there?
A. Going on three years.
Q. Three years?
A. Yes, sir.
Q. How many years would you say you have known Mr. Theriot?
A. About five, six, maybe seven years.
Q. You haven't known him any longer than that?
A. I may have. I don't recall. I never had any business to do with him.
Q. Did you know of him?
A. Well, I know of the Theriot's yes.
Q. When did you first meet him?
A. I don't know, sir.
Q. You don't know?
A. I don't recall.
Q. How old are you?
A. Thirty years old right now.
Q. Where were you born?
A. Grand Isle, Louisiana.
Q. Isn't it a fact that you have known Mr. Theriot, Paris Theriot, all your life?
A. Well, I know of the Theriot's.
[fol. 197] Q. Isn't it a fact that you have known Mr. Paris Theriot, that gentleman over there (indicating) all your life?
A. I don't recall that, sir. I don't know.
Q. You don't know?
A. No.
Q. What kind of business were you in down there prior to this December 18th, 1955, that you say you were in the restaurant business?
A. Restaurant and grocery.
Q. You don't have a bar?
A. No, I don't have a bar.
Q. You just have a grocery store?
A. Yes, sir.
Q. What is the name?
A. Fishermen's Restaurant & Grocery.

Q. You say Fishermen's Restaurant & Grocery? You don't own the Fishermen's Bar?

A. No, sir.

Q. Who owns that?

A. Two of my brothers and Mr. Adams.

Q. Two of your brothers and Mr. Adams?

A. Yes, sir.

Q. What is your brother's name?

A. Leo and Mike Terrebonne.

Q. You don't have any interest in that?

[fol. 198] A. No, sir.

Q. Do they have any interest in your grocery store?

A. No, sir.

Q. Isn't it a fact Mr. Paris Theriot financed you when you went into business?

A. No, sir, he never did finance me.

Q. He financed your brothers?

A. I don't know, sir.

Q. You know, as a matter of fact that he endorsed the note for them?

A. I don't know anything of my brother's business.

Q. Did he ever loan you any money?

A. No, sir.

Q. Did he ever endorse a note for you?

A. No, sir.

Q. Do you buy any fish or deal in any marine products?

A. No, sir.

Q. You just sell groceries?

A. Groceries to the fishing parties that come every day to go fishing, and people that come in the restaurant to eat.

Q. And you have a restaurant there?

A. Yes, sir.

Q. Do you serve beer at your restaurant?

A. No, sir. I don't have no beer license. I have to get it at the bar to serve it to the customers when they order their meals. Prior to that, when they don't order their meals, [fol. 199] they have to go to the bar and get it over there—

Q. Well, if they want some beer with their Shrimp a la Terrebonne, where do you get the beer? You get it from them?

A. At the bar.

Q. You bring it over there to them?

A. Yes, sir.

Q. And if they want a cocktail before they have their meal where do you get that?

A. At the bar, sir.

Q. What bar?

A. At the Bayou Rigaud Seafood Bar.

Q. That's your brothers' bar?

A. Yes, sir.

Q. Now do you keep that straight? Who collects for this drink?

A. We do, and in the restaurant.

Q. And then do you pay your brother separately, on account of that?

A. Yes, I pay him when I get the drink, and the customer pays me when he finished eating and when they are ready to leave.

Q. And that is the reason you don't have a bar there because your brothers' bar is right next door to you? Is that the reason?

A. Well, that is part of the reason.

[fol. 200] Q. Now, was your business place open that Sunday the 18th of December?

A. Yes, sir.

Q. What time did you open it that morning?

A. Around 4:00, 4:30.

Q. Why do you open so early?

A. Well, we had to catch these people that goes fishing in the morning. They usually go fishing around 5:00 in the morning and they eat breakfast and they take sandwiches to take out with them, and a few other things, fishing tackle, and so on.

Q. So you were there to cater to that trade?

A. Yes, sir.

Q. And you opened up that morning yourself?

A. Well, myself, my sister, and my employees that work for me.

Q. All of you were down there?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. Was your wife there too?
A. No, sir. She didn't work for me.
Q. You say she didn't work for you?
A. No, sir.
Q. Were you there at noontime?
[fol. 201] A. Yes, sir.
Q. Did you see Mr. Theriot then?
A. No, sir, I did not.
Q. When did you first see Mr. Theriot?
A. Around 6:00 o'clock that evening.
Q. You didn't see him at 2:00 o'clock, 3:00 o'clock, 4:00 o'clock?
A. No, sir.
Q. 5:00 o'clock?
A. No, it was 6:00 o'clock.
Q. It was 6:00 o'clock before you saw him?
A. Yes, sir.
Q. Was it dark or daylight?
A. It was kind of getting dark.
Q. Where was he when you saw him?
A. I was going to the warehouse—
Q. Where was he?
A. He was at the bar.
Q. What bar?
A. The Fishermen's Bar, the Bayou Rigaud Seafood Company.
Q. Where was he sitting?
A. I'd say he was sitting in the middle part of the bar.
Q. At the bar and not at a table?
A. No, sir, the bar.
Q. Who was with him?
[fol. 202] A. Some people down there, but I don't know if he was with any particular one.
Q. Name somebody else that was in there?
A. I don't recall anybody that was in there except the bartender and Mr. Adams.
Q. What about Mr. Bradberry?
A. Yes.
Q. He was there?
A. Yes, sir.

Q. Was anybody else sitting at the bar there with Mr. Theriot?

A. There were people sitting there, but I don't know who they were.

Q. How did you happen to see Mr. Theriot?

A. Well, I had to pass right behind the bar to go to my warehouse.

Q. You go from your restaurant and grocery store behind the bar to get to your warehouse?

A. Yes. That is the only way that I can get from there.

Q. What were you going to the warehouse for?

A. In order to check my warehouse before closing the place.

Q. You were getting ready to close?

A. Yes, sir.

Q. Did anybody go with you?

A. No, sir, I was by myself.

[fol. 203] Q. What did you mean "check the warehouse"? What do you do?

A. To see if the windows are locked.

Q. You lock it?

A. Yes.

Q. Anybody have a key to it besides you?

A. Well, it is locked from the inside of the bar, sir.

Q. What do you keep in the warehouse?

A. My groceries and a few other things.

Q. Do you have any liquor supplies of the bar kept in there?

A. Yes, but that is separate from the warehouse. The liquor warehouse is before I get to my warehouse.

Q. But it is all in one building?

A. Yes, sir.

Q. How long were you in the warehouse?

A. Just a few minutes.

Q. And then you walked back out?

A. I went inside my restaurant.

Q. And just as you walked in the warehouse and walked back, that is when you saw Mr. Theriot sitting at the bar?

A. I saw Mr. Theriot. I saw him when I was going in the warehouse, and I saw him when I came back outside.

Q. Did you speak to him?

A. I just told him hello when I walked into the warehouse.
Q. What did you tell him when you walked out?
[fol. 204] A. I didn't tell him anything.
Q. Did he offer to buy you a drink?
A. No, sir.
Q. Do you drink?
A. Occasionally.
Q. Did he have a drink in front of him then?
A. I saw a glass in front of him.
Q. Was it empty or did it have anything in it?
A. I don't recall.
Q. But you say you saw a glass in front of him?
A. Yes, that was all.
Q. What time did you close your place?
A. Between 7:30 and 8:00 o'clock.
Q. Between 7:30 and 8:00 o'clock?
A. Yes, sir.
Q. And then you locked up and got in your car, your panel truck, and you left? Is that correct? Is that what you are saying?
A. Yes, sir. Between 7:30 and 8:00 o'clock, that is when I got into my truck and went towards the Island.
Q. Did you see anybody else before you left? Who was the last customer in your restaurant or grocery store?
A. Well, I don't recall who they were, sir.
Q. Did you have any there?
A. I had a few customers then, just before I closed.
[fol. 205] Q. And you started on down the road, and then you say that that was when Mr. Theriot passed you?
A. That is right.
Q. How do you know it was him?
A. I knew his car.
Q. What kind of car was it?
A. It was a '55 Oldsmobile, red and white.
Q. Did any other cars pass you?
A. No, sir.
Q. I understood you to say that you went on down the road and other cars passed you?
A. That was after you pass the Humble road.
Q. After you passed the Humble road two other cars passed you? Was that what you said?

A. Yes, sir.
Q. Is that right?
A. Yes.
Q. What kind of cars were they?
A. I don't recall.
Q. You don't know what color they were?
A. They were dark, but I don't know if they were black or dark blue or gray.
Q. Did you recognize Mr. Theriot as he went by you?
A. Yes, sir.
Q. You did see him?
[fol. 206] A. Yes.
Q. You are not mistaken about that?
A. No, sir.
Q. What did he have on?
A. He had some clothes on, as far as I know.
Q. Did he have a hat on?
A. Yes, sir.
Q. Actually, you think you recognized him by his car more than recognized him as driving the car? Isn't that a fact?
A. I knew it was Mr. Theriot and I knew it was his car, because when he passed me he wasn't going that fast.
Q. How fast was he going when he passed you?
A. Around thirty-five miles an hour when he passed me.
Q. How fast were you going?
A. Approximately twenty-five miles an hour.
Q. Did he dim his lights as he went by you?
A. I don't recall that, sir.
Q. Did he blow his horn?
A. No, sir, not that I know of. I don't recall it.
Q. And he just dimmed his lights?
A. Yes.
Q. And you don't know what kind of car these others were that passed you?
A. No, sir, I don't know what model they were.
Q. And you didn't recognize anybody in those other cars?
[fol. 207] A. No, sir.
Q. I believe you stated that you came back the next morning, and that would be Tuesday morning, Monday morning?

A. Monday morning, yes.

Q. To open up again, and that was around 4:00?

A. Yes, sir.

Q. Well, in between 4:00 and 4:30, what was the weather then?

A. I don't remember, sir.

Q. You don't remember?

A. It is too far back for me to remember exactly how the weather was.

Q. You just don't remember?

A. No, sir.

Q. Did you hit the man, Mr. Mercer, with your car?

A. Not I, sir, not I.

Q. You know you didn't hit him?

A. No, sir.

Mr. Brumfield: That is all.

Mr. Hughes: I have no further questions.

The Court: We will recess this case now until 10:00 o'clock tomorrow morning. The Jury is instructed not to [fol. 208] discuss the case with anyone. If anyone attempts to discuss it with you, report the matter to the Court.

You are also instructed to reserve your decision in this case until you have heard all of the evidence and the matter has been submitted to you for your deliberations. We will recess now until 10:00 o'clock tomorrow morning.

(Whereupon, Court recessed.)

Proceedings

Morning Session

(Friday, October 18, 1957)

The Court: Proceed. Call your witness.
Mr. Hughes: I would like to call State Trooper Folse.

Jesse M. Folse called as a witness at the instance of the Plaintiff, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hughes:

Q. Mr. Folse, what was your occupation on December 18th, 1955?

A. I was with the Louisiana State Police, a trooper.

Q. On December 19th did you get a call to go to Grand Isle?

A. If it was on December 19th, it is in relation to this [fol. 209] case—I don't recall whether I had a call from my office, which is Thibodaux, Louisiana, by radio, or as to whether I was notified by the deputies of Lafourche Parish as to this case. That I cannot say.

Q. Did you go to Grand Isle on the Mercer accident?

A. Yes, sir.

Q. When you arrived at Grand Isle was the body there?

A. No, sir.

Q. Who did you meet at Grand Isle? I mean any other officers?

A. Yes, I met Deputy Prudhomme, with the Jefferson Parish Office, and Deputy Billy Gautreau, with the Coroner's Office.

Q. Did you leave Grand Isle with those deputies?

A. In relation—I mean in saying that I left with them, we were in separate cars when we left the Island.

Q. Where did you go?

A. I went to Golden Meadow.

Q. And that was on the same day?

A. That was the day I was called for this case.

Q. Were you present when Mr. Paris Theriot's automobile was inspected?

A. Yes.

Q. Did you visit the scene of an accident that Mr. Theriot claimed to have had?

A. That is correct.

[fol. 210] Q. Where was that scene?

A. I think it was about—the present highway today is La 308, and I think the highway number was La 77 at the time. That was the black top side—

Q. And who went out there besides you?

A. That was the two deputies just mentioned, Deputy Prudhomme and Deputy Billy Gautreau.

Q. What did you find there?

A. May I state this, that the investigation was made by the two deputies from Jefferson Parish. I just assisted them in the findings. We found at the scene, and that was in relation to this accident that Mr. Theriot said he had, and there was marks on the highway which he stated the accident had taken place. The skid marks on the highway were very visible. I couldn't exactly say what was the length of the skid marks that was present on the open highway at the time, but they were on the right lane of traffic facing north, and that is La 77, which is presently 308, and then blending over to the left into the other lane of traffic, very heavy, and over into what are—rather on the side of the highway, on the shoulder, which was very wide at that particular area.

Q. Did you see any physical evidence at the scene of that accident?

A. The only physical evidence that was present there was [fol. 211] a 12x12. It was a 12x12 piece of wood, I'd say, about three feet long, that was on the side of the highway, that Mr. Theriot said had struck his car when he hit the truck that he collided with, that fell on the car that he stated, and that was—on the log was a nail that had some scrapings of white substance on it, which could be almost anything, I guess, anything like paint, or it could have been anything. That I really don't know, what was on the nail, and he said that that scratched up his hood and made

the dent on the hood, and that was laying on the—that would be facing north. Either way, the log was lying on the shoulder, what little shoulder they had on La 77, to its right, and that would be facing east. It would be northeast, rather.

Q. What happened to that log or piece of lumber?

A. That log was taken by the two deputies of Jefferson Parish and placed in the trunk. I don't recall whether it was placed in the trunk of the State car which was presently mine, or whether it was placed in the deputies' vehicle at the time, their Parish automobile.

Q. Were any scrapings taken from that nail?

A. As far as I know, no.

Q. The whole thing was—

A. In other words, the log was taken by the two deputies, I guess, for evidence.

Q. Were you present, Mr. Folse, during this investigation [fol. 212] in Golden Meadow?

A. Yes, I was with the officers, I mean throughout most of the investigation, like the interrogation. Well, I didn't go into the interrogation with witnesses that were brought into the Town Hall at the time.

Q. As far as you were able to determine, did Mr. Theriot cooperate with the officers?

A. As far as I know he was very cooperative.

Q. Was an inspection made of Mr. Theriot's automobile?

A. Definitely it was well gone over.

Q. How was it gone over first?

A. I mean—will you care to phrase that again?

Q. What is the first thing that was done when the car was inspected? Where was the automobile?

A. The automobile was first inspected on La 308, like I stated, which was La 77 at the time, right off the highway, where they were building a tug, a tugboat. That is where the car was first inspected. That is where Deputy Prudhomme conferred with Mr. Theriot about the damaged automobile. It was right there where they were building this tug. Just right across the bayou from the corporation limits. That is where Mr. Theriot stated, when Officer Pradhomme had confronted Mr. Theriot with the automo-

bile, the damages to the automobile, that is where Mr. Theriot stated that he had been in an accident, and that is when we proceeded to the scene where Mr. Theriot stated [fol. 213] he had an accident.

Q. Where did you first make any other inspection of the automobile other than the visual inspection of that damage?

A. Well, after we left the scene where Mr. Theriot stated he was involved in an accident, we went back. In fact, Deputy Prudhomme asked Mr. Theriot if he wouldn't mind driving his car over to the Town Hall, and Mr. Theriot got in the car and the car was driven, and the State car, and the Jefferson Parish Officials' car we followed, you know —we might have gone ahead of them—that I don't recall. I don't recall whether he went ahead, and that's where the car was brought, in the back of the Town Hall, near the square. That is where the investigation got under way.

Q. Was that a casual investigation or a thorough investigation?

A. I would say that in the capacity of the officers, including myself, there, I think that the investigation, as far as the capacity, as I said, of the officers, I think that the investigation—I mean as far as we could go with it, I think that that was sufficient, other than having the car impounded for laboratory, for further laboratory examination.

Q. Do you recall whether anybody looked inside the automobile?

A. No, sir, I don't remember anybody looking into the automobile, in the inside.

[fol. 214] Q. Do you recall whether the automobile had seat covers?

A. Well, I'll tell you—I got in the car one time, and I couldn't say whether it was plastic covers or whether it was just any type of seat covers. I really don't know because I got in there to plug in a light that he wanted, a brighter light, for further investigation of the damages on the automobile.

Q. Did Mr. Theriot state to you or in your presence that he had struck a cow?

A. No, sir. At no time he said in my presence that he struck anything other than being involved in an accident with a truck.

Q. The car was later lifted on a grease rack, was it not? Was the car later put on a grease rack and lifted up?

A. After the car was gone over at the Town Hall, it was later put on a grease rack. It was raised and inspected underneath.

Q. Can you tell us what was found underneath the car, if anything?

A. Deputy Prudhomme and I was under the automobile when some strands of whatever it was was found under the tie rod—I would call them tie rods, or the thing that governs your two wheels, on the right side, which would be to the right front end, underneath, on the tie rod, strands of whatever it was. Whether it was hair from a human, [fol. 215] or whether it was a dog, or whether it was strands of grass, that I couldn't determine. However, these things were taken by Officer Prudhomme at the time.

Q. What did it appear to you to be?

A. I couldn't say whether it was hair, whether it would be hair from an animal, or whether it would be that type of grass around that area. I couldn't say because it was very greasy under the automobile, including whatever he took out from on that tie rod.

Q. Did you know of any grass or weeds around there similar to that?

A. There is some of it, especially in the winter, yes.

Q. Who found that substance?

A. You're talking about the hair or whatever it was, strands of hair, human, or dog? That was Deputy Prudhomme.

Q. Did you see a towel which appeared to be blood on it that someone found in the car?

A. No, sir. At no time in the investigation I saw any cloth at all.

Q. No cloth at all?

A. No cloth at all. Under no circumstances.

Q. Mr. Folse, who was in charge of this investigation as far as you knew?

A. As far as I was concerned, the investigation was taken over by Deputy Prudhomme and Billy Gautreau, [fol. 216] Deputy Billy Gautreau.

Q. Was the investigation begun when you arrived at Grand Isle?

A. I am assuming it had because the body had already been moved from the scene where the body was supposed to have been. It was already gone when I got there.

Q. Under those circumstances are you required to make a report to the State Police?

A. If I am the investigating officer, yes, but I saw no alternative to make the report after the investigation was taken over by deputy sheriffs of Jefferson Parish at the time, after the body had already been moved, so I saw no reason but only to assist the deputies because in four years I have only investigated three wrecks on the Island, and they usually take over that phase, Jefferson Parish, and we are never called down there for any accidents unless the other officers are not available to take care of it.

Q. Did you make a report to the State Police?

A. No, sir. I did not write a single word down on a piece of paper.

Mr. Hughes: That is all.

Answer Mr. Brumfield's questions.

Cross examination.

By Mr. Brumfield:

[fol. 217] Q. Officer Folse, where was your territory? What assignment did you have?

A. My assigned territory was from Raceland to Grand Isle.

Q. It included Grand Isle?

A. Yes, sir.

Q. Where were you living?

A. I was living in Lockport.

Q. Were you subject to call twenty-four hours a day?

A. That is right.

Q. Did you work on an eight-hour shift?

A. Not at that time.

Q. Were you sometimes on days and sometimes night?

A. Not at that time. I was on twenty-four-hour call.

Q. And when there's a wreck, a traffic accident of any kind in that vicinity, in that area, from Raceland to Grand Isle, including Grand Isle, you are called?

A. That is correct.

Q. When you do make an investigation you know and realize that you are under a duty, under the Law of Louisiana, to file, to make and file a report, aren't you?

A. That is correct.

Q. And you say that during the time of, I believe you said four years, prior to December of 1955—

A. Yes.

Q. —that you were on duty in that area and you filed how [fol. 218] many reports?

A. About three reports, accident reports.

Q. Why was that?

A. Because the officers of that particular area of Jefferson Parish, on the Island, took charge, and I just made the report. Whether they sent one in or not, I don't know.

Q. Was there any friction between the State Troopers in that area, yourself, and the deputies?

A. No, sir.

Q. Did the deputies down on Grand Isle—

A. They took the liberty in making their own reports.

Q. In other words, they feel that they are the kingfish down there?

A. They were the big dogs.

Q. They were the big dogs?

A. That is correct.

Q. But you did get a call, though, to go down there?

A. As I said, I don't know whether it came from my office or whether a deputy was—whether a deputy had notified me over the radio of this hit-and-run, of this accident, this particular accident, but I do know that it was my intention of going down there to investigate this particular accident.

Q. And you don't know whether you got a call at home or whether you got it over the radio?

A. That, I don't know whether it was over the radio, [fol. 219] by 'phone, or by a deputy.

Q. Do you know what time you started out to go to Grand Isle?

A. I know that it was, I would say, early in the morning. I really don't know what time it was when I set out. Of course, the records are kept of the time, the time that we leave the house.

Q. Was it 6:00 o'clock, 7:00 o'clock, or 8:00 o'clock, or 9:00? Was it in the morning, or was it in the night?

A. I know that I was on day shift. It wasn't at night. It was in plain day. The sun was shining bright.

Q. Would you think it was before noon or after?

A. Definitely before noon.

Q. So then it was that Monday morning?

A. It was on a—I don't know if it was on a Monday or not. I don't recall if December 18th or 19th fell on a Monday. If that is on Monday, that is what it was.

Q. The evidence shows Mr. Mercer was killed at 7:30 P.M. December 18th, which is a Sunday—

A. It wasn't a Sunday that I went.

Q. And December 18th would be a Monday, so would you say it would be Monday morning that you went down there?

A. I would say that it was a morning, but I can't say whether it was Monday, Tuesday, or Wednesday, or whatever day it was.

[fol. 220] Q. Would you say that it was before 10:00 o'clock that you got there or after 10:00 o'clock?

A. Well, I would say that it was around in the vicinity of maybe 10:00 or 11:00.

Q. Did you meet an ambulance while you were on the way?

A. Enroute, yes, either an ambulance or a hearse. I knew that it was connected with a funeral home, that's for sure.

Q. Did you later learn that it was the hearse carrying the—

A. The hearse carrying that particular body, yes.

Q. The Mercer body?

A. Yes.

Q. Do you know what time it was when you passed that hearse that you—

A. No, sir, because I was traveling pretty fast, going to the Island at that time, and I don't recall as to what time. I know that it was in the morning that I met that ambulance or hearse, or whatever it was.

Q. Did you go on, continue on down to Grand Isle that morning?

A. I continued all the way to the Isle from the time I was notified like I said, as to whether I was notified by my office, or by deputy that contacted me by radio, or by public service but the minute I got the call I stopped no place. I continued all the way down to Grand Isle.

[fol. 221] Q. Did you go to the scene of the accident?

A. That's the first place I stopped, because the—

Q. How did you know where it was? Were people down there?

A. Because there were people around. There were some people around, so I gathered that is where the accident had taken place.

Q. Did you see a spot of blood?

A. When I got out of the car, when I got out of the automobile and looked around, yes.

Q. Did you see a spot of blood?

A. There was a spot of blood in that particular area.

Q. Was it right in the track of what appeared to be automobile tracks?

A. That's correct.

Q. That was on the right shoulder of the highway?

A. Yes, right shoulder, and that would be facing toward the upper end of Grand Isle.

Q. That would be about three feet from the asphalt portion of the highway.

A. Approximately.

Q. Did you see any other signs or evidence there?

A. They had a lunch pail there that I recall very distinctly, and a few scattered pieces of paper, and I assumed that they were just from trash, debris, thrown out of the automobiles, or probably the wind blew them there, and [fol. 222] they also had, I would estimate maybe two blankets that was just away, and that would be south of where the blood stains were.

Q. And what deputies or what officers were there when you got there?

A. There was none when I got at the scene.

Q. You were the first one?

A. No, I imagine they were there before I was, because the body was moved.

Q. Did you learn whether or not any other officers got there before you did?

A. I just assumed that they were there before I was, being as the body was moved. It was later that I contacted them.

Q. You didn't find out or determine who had authorized the removal of the body?

A. No.

Q. You didn't inquire?

A. Well, I mean, even after I saw Prudhomme, and Billy Gautreau, I knew that Billy Gautreau was connected with the Coroner's Office here in Jefferson Parish—

Q. Where did you see them?

A. I can't say whether they came to the scene while I was there, or whether I met Officer Prudhomme and Billy Gautreau at the Fishermen's Bar over by the Bayou Rigaud.

Q. You did see them on Grand Isle when you first went down there?

[fol. 223] A. After I was at the scene, yes.

Q. And you accompanied them in their investigation?

A. In other words, I assisted them throughout the day, and from then on, when I first met Billy Gautreau and Deputy Prudhomme, I assisted them all the way through till the time I went home.

Q. Were you there when Deputy Gautreau made the pictures?

A. No, I wasn't.

Q. You weren't there? He had made them before you got there?

A. He apparently did, because there was no photographs around that I noticed there, when I was there

Q. And Billy, or Deputy Gautreau, he is a photographer?

A. Yes, he is the one that usually takes pictures.

Q. What did you then do? Did you leave Grand Isle, and if so, where did you go?

A. No, sir, we didn't leave Grand Isle right off. We went down to Fishermen's Wharf, and what took place with Deputy Prudhomme there, I don't know. We got separated at the Fishermen's Bar, and I don't recall whether I got a cup of coffee and whether he went further inquiring the people at the bar, but I do know that after we got in the automobile at Fishermen's Bar, I got in with Deputy Billy Gautreau and Deputy Prudhomme and went over to the far end of the Island and contacted the victim's boss, whom he was working for.

[fol. 224] Q. In other words, you were there when—

A. I beg your pardon. Before then we went down to Adams' bar, and Deputy Prudhomme questioned either the barmaid or owner of the place at that time, when a fellow was supposed to have left, or seen leaving the place.

Q. And that's Mr. Mercer?

A. Well, the only owner—I know the Mr. Adams that owns the place, and that is on Bayou Rigaud proper.

Q. You were there when it was found out that Mr. Mercer had left the place last, where he was before he was killed?

A. That's when I found out, through the investigation with the two deputies, that he was last seen leaving Mr. Adams' place on the Island.

Q. He was walking on down the highway?

A. Well, we just assumed that he was, that that was the direction he was walking.

Q. And you also learned there in your investigation that Mr. Paris Theriot had been there in the Fishermen's Bar drinking, didn't you?

A. It was learned that he was there. I can't say in what capacity, whether the man was drunk or not. I don't know.

Q. You didn't determine or find out or hear Mr. Theriot say himself that he had been drinking?

A. It is possible that he said it.

Q. Did you or did you not?

[fol. 225] A. I did not. Let's put it that way.

Q. Mr. Theriot never did tell you he was drinking?

A. I mean you are asking me a question direct, and I can't say that, only maybe that there was a possibility that he did mention in my presence that he had a few drinks.

Q. Well, either he did or he didn't?

A. I mean that's a direct question. I wasn't there when the man was drinking.

Q. So you can't give me a direct answer?

A. I can't give you a direct answer, only because he might have said during the course of the conversation that he had a few drinks at the Fishermen's Bar.

Q. But you can't answer that direct?

A. I can't answer direct. I'd rather answer not direct, because I don't know. There is a possibility that he might have said it.

Q. When you went to the scene on the old highway, Louisiana 77, I believe is your designation of that, and isn't it a fact that you saw where there was skid marks on this asphalt portion of the highway, and I mean on the asphalt portion of that highway, in the right, turning towards the left, four wheels in a skidding fashion making four marks out over the shoulder, out into the fresh plowed earth, on the side of the road, some twelve feet? Isn't that true?

A. Yes, that is true.

[fol. 226] Q. Isn't it also true that the car tracks of the vehicle, the vehicle tracks that you saw there did not careen back to the right and get back on the highway?

A. According to the point where Mr. Theriot brought us, the car, if it swerved over to the left, did not come back to the right any time after it left the highway, if those are the marks.

Q. In fact, whatever vehicle was in that place where you saw, it had to be pulled out, didn't it?

A. I would say that if it was soggy and wet, it had to be pulled out.

Q. You say if it was soggy and wet? Was it?

A. It was wet.

Q. And it was dark, chocolate-covered mud there, wasn't it?

A. That's correct, it was mud.

Q. Now, you were present when this investigation was made of Mr. Theriot's automobile, is that correct?

A. Yes. I mean from the time we saw the car until the time I left the place.

Q. And, as a peace officer of experience in making investigations of this kind, you think that it was a thorough investigation of the car?

A. I would say as far as the capacity and the ability of the officers that were at the head of this investigation and [fol. 227] myself, I would say that the things were taken, well, that there was an investigation which could be either proven one way or vice versa.

Q. And you saw Officer Prudhomme, Deputy Prudhomme take some loose scrapings off the hood of that automobile?

A. He took off scrapings, blue, and he took scrapings of the white or whatever that scuffed place was on the hood.

Q. And you say that he also found what could have been human hair?

A. And he also put that in an envelope, yes.

Q. He put each one of these substances in and sealed them?

A. In a separate envelope. Now, as to whether he sealed them, that I don't know. I do know that he put them in there.

Q. You saw him do that?

A. Yes, but as to whether he sealed them, I don't know. I do know that he put all the scrapings in different envelopes.

Q. And this white substance that you saw, what did it look like to you?

A. Well, the substance, it was dry, and it could have been —well, I retract that, because I don't know, because no test was taken of it, and it could have been something like a cleaner, something like a polish that had been dried on the automobile.

Q. But actually to you, it looked like Old Dutch Cleanser?

A. Well, Old Dutch Cleanser, when it's dry, it looks like [fol. 228] polish to me, and that's what it looked like to me, but I'm not stating that it's Old Dutch Cleanser because I don't know.

Q. So the only way that it could have been ascertained was to—

A. If it was tested at the time, yes.

Q. And it was to be sent to the laboratory?

A. Yes.

Q. And that is where you thought it was going to be sent?

A. That is correct, that is why I had the impression that everything was taken.

Q. What happened to this evidence?

A. I don't know. I haven't the slightest idea.

Q. Did you make inquiries after that to find out?

A. Yes, I made inquiries—three 'phone calls.

Q. What did you find out?

A. Nothing.

Q. You couldn't find out anything?

A. Always delays, so I decided I might as well drop the whole thing.

Q. You ran up into this concrete wall?

A. The last 'phone call that I made, the man didn't give me a satisfactory report, so I said it's no use for me to waste 'phone calls, and I let the whole matter drop. I was just assuming that everything was going to be sent to the laboratory. As a rule it would have been.

[fol. 229] Q. That should have been done?

A. I was interested in the results just as well as the two officers making the investigation.

Q. Did you see the blue denim clothes that Officer Prudhomme—

A. No, sir. The only thing that I know is that the man, according to the pictures, the man was wearing overalls.

Q. But you didn't see the clothes that Officer Prudhomme had?

A. I did not see his clothes at all.

Q. And you did not see the towel or the clothes?

A. I saw no clothing. The only thing that I saw were the two blankets at the scene of the accident which I assume was used to keep him covered, but other than that, I haven't seen a bit of clothing that was worn by the victim or clothing or any part of his clothes that were taken from Mr. Theriot's car or any other place.

Q. Officer Folse, did you learn that there had been a pay-off in this case?

A. I was told, hearsay.
Q. You was told there was?
A. I was told that there was a pay-off.

Mr. Brumfield: That is all.

Redirect examination.

By Mr. Hughes:

[fol. 230] Q. Officer Folse, I believe you testified that the body had been moved before you got on the scene of the accident?

A. Yes, that is correct.

Q. You used the words "hit-and-run," and you don't know whether it was hit-and-run or not?

A. No, but here's the thing; when we relate to a hit-and-run like that and don't—I mean that is the way we usually refer to them, but I'm not saying that it was a hit-and-run.

Q. In other words, when a body is found on the side of the road, you refer to that as a hit-and-run?

A. Well, you've got me in a bind there. I mean—let's say that I am just assuming that the body was hit by some object, which was later learned by the officers that were conducting the investigation.

Q. The fact that Mr. Theriot's car had to be pulled out after it ran off the road, that is your opinion, is it not?

A. I would say that if the terrain at that time was wet, I believe it had to be pulled out.

Q. That is your opinion?

A. That's my opinion. That's my only opinion, that if it was wet and soggy at the time.

Q. Where were the blue scrapings, Mr. Folse?

A. It wasn't scrapings, it was just blue streaks about that long (indicating with hands), right there near where the nail supposedly was to have scraped the portion of that hood on the right-hand, the right front. In other words, it [fol. 231] was closer to the windshield than it would be to the headlight.

Q. And how far from the windshield?

A. I would say that the blue marks, right offhand, would be about three inches where the hood stops, you know,

where the line of the hood going towards the front—in other words, where the hood opens, starting from where the hood ends, going back towards the dashboard of the automobile.

Q. How far would that make it from the windshield?

A. From the windshield I would say maybe about six or seven inches.

Q. Was the windshield intact?

A. Yes. That was well gone over too.

Q. Were there any markings on the top of the car?

A. No, no markings?

Q. Does the windshield slant forward or is it straight up and down?

A. I couldn't say whether that was exactly a slope, or whether it was straight or not. I didn't pay that much attention to it.

Q. How does this photograph marked Gautreau 9—first, does this photograph marked Gautreau-9 refresh your memory as to whether or not the windshield is straight up and down or sloped?

(Photograph to witness.)

A. It might have had a slope in it (viewing photograph) but not all that much. In other words, I'm referring to [fol. 232] these blue marks 'way back here by the windshield (indicating on photograph), that is what I was referring to, back here, that it wasn't very big, but I imagine it was right over here in that vicinity (indicating on photograph), right over here, before reaching the windshield. Most of the marks was right in here, about, I imagine, three inches before when the hood raises, where I couldn't see going over here to the dashboard, where the hood raises here, but the blue marks was about three inches on the hood in back from the opening here (indicating on photograph).

Q. When you referred to the deceased being in Adams' place on the night of December 18th, did you mean Adams' place or Milliet's place? Did you mean the Fishermen's Bar or the Bayou Bar?

A. I have always known it as Adams' place. I know the man very well. I have known that he was the present owner of the place. He was rented out at the time, I think.

Q. Who was operating it?

A. I couldn't say right offhand who was operating that place. I think the barmaid—I knew the barmaid, one of the barmaids that was working in there.

Q. What was the name of it?

A. Of the place? I really don't know. I think it has a name on it. I am not referring to the new Fishermen's Bar. This is away from the Fishermen's place. This place [fol. 233] is on Bayou Rigaud proper, right alongside of Milliet's place, Mr. Milliet's place.

Q. You are not referring to Terrebonne's place?

A. No, I am not referring to Terrebonne's place at all.

Q. Mr. Folse, who told you there had been a pay-off in this case?

A. Trooper Milliet.

Q. And that is all you know about it? Just that Milliet told you there had been a pay-off?

A. That is the only one. We had a conversation one night while I was on duty and happened to stop by, and I happened to mention this case. He said, I asked him, "Did you find out what happened to the evidence?" "Oh", he said, "Prudhomme was paid off."

Q. He said that Prudhomme was paid off?

A. He said that Prudhomme was losing weight over it, or something like that, you know, in a regular conversation that goes on.

Mr. Hughes: That is all. Thank you.

Recross examination.

By Mr. Brumfield:

Q. It was generally rumored and discussed all around about this pay-off, wasn't it?

A. Well, the only time I ever heard of a pay-off was [fol. 234] through Trooper Milliet, when he stated it.

Mr. Brumfield: That is all.

Mr. Hughes: I would now like to call Leo Terrebonne.

LEO TERREBONNE called as a witness at the instance of the Defendant, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hughes:

Q. Mr. Terrebonne, on December 18th and 19th, were you the owner of, or part owner of the Fishermen's Bar and Restaurant in Grand Isle?

A. We have three partners.

The Court: Keep your voice up so the Jury can hear you.
The Witness: We were three partners.

By Mr. Hughes:

Q. Who are they?

A. Mr. Adams and Mr. Terrebonne.

Q. Who is the other one?

A. Mac Terrebonne.

Q. Were you there on Sunday, December 18th, 1955?

A. Yes, sir.

Q. Did you see Mr. Paris Theriot on that day?

[fol. 235] A. I did.

Q. Did you have any business with Mr. Theriot on that day?

A. Yes, I did business with him, me and him, to buy a car. I bought a car from him.

Q. You bought a car from him?

A. Yes, sir.

Q. Was the deal consummated on that day? You agreed to buy?

A. Yes, I agreed to buy one.

Q. About what time did you leave your place that evening?

A. About dark, about 5:00, 5:00 or 6:00 o'clock. I wouldn't know what time it was.

Q. Was Mr. Theriot, Paris Theriot there when you left?

A. I never noticed. When I left I was outside. I didn't go inside.

Q. Do you know how long Mr. Theriot had been there when you first saw him?

A. About 2:00 o'clock, that is when we made the deal. That is when we made the deal, around about 1:00 or 2:00 o'clock.

Q. Did you see Mr. Theriot's car there?

A. Yes, sir.

Q. Did you notice anything unusual about the automobile?

A. Yes, it was kind of a bump on the front fender.

Q. Did you inspect it?

A. I just looked, and I walked off. I just looked around and I walked off.

[fol. 236] Q. You didn't pay any attention to it?

A. No, I didn't pay any attention to it, and just walked off.

Q. As far as you know, when you left Mr. Paris Theriot was still there, is that correct?

A. When I left my place, I didn't see him, and it was too dark, like I said, it was about 6:30, about dark, and I didn't notice if he was, if he was still around.

Q. Did you return again that evening?

A. No, sir. I took off.

Q. When did you come back?

A. The next morning.

Q. About what time?

A. About 8:30, 9:00 o'clock.

Mr. Hughes: That is all. Answer Mr. Brumfield's questions.

Cross examination.

By Mr. Brumfield:

Q. You are Leo Terrebonne?

A. Yes.

Q. And you said that your partner was—

A. My partner was Mac Terrebonne.

Q. Did you say "Mac Terrebonne"? Is he a man or—

A. Yes.

[fol. 237] Q. What relation is he to you?

A. My brother.

Q. And what is Adams' first name?

A. Harris Adams.

Q. And the three of you were all in business together, is that it?

A. That is correct.

Q. Do you have any other brothers?

A. Yes, I do.

Q. What are their names?

A. Maurice, Polite Terrebonne, and Andrew Terrebonne.

Q. What business are they in?

A. My brother runs a restaurant, another brother runs another restaurant.

Q. Down there on Grand Isle?

A. On Grand Isle?

Q. Did you have any interest in those restaurants?

A. No, sir. Oh, yes, in the Fishermen's Bar, yes. That belongs to the Bayou Seafood Company.

Q. That is what I'm getting at, Mr. Terrebonne, who owned the Bayou Seafood Company?

A. We do.

Q. Who is "we"?

A. The Bayou Seafood Company, Mac Terrebonne, Adams, and Leo Terrebonne.

[fol. 238] Q. You all own that?

A. Three of us.

Q. And what is this Fishermen's—is it the Fishermen's Bar, the Fishermen's Wharf, or is it the Fishermen's Restaurant?

A. Yes.

Q. And that is the partnership with you and Mac and Harris, is that right?

A. That is correct.

Q. That doesn't have anything to do with the Seafood Company?

A. No, sir.

Q. Is the Seafood Company operated in the same building?

A. The same building, same office.

Q. What time did you get there that morning, Sunday?

A. That Sunday?

Q. Yes?

A. About 5:00 o'clock in the morning.

Q. About 5:00 o'clock?

A. Yes.

Q. You go there every morning?

A. Every morning. Not exactly at 5:00 o'clock, not every morning at 5:00 o'clock, but sometimes at 4:00 o'clock, and sometimes I go later than that.

Q. What is your usual time to get there?

[fol. 239] A. I go down there about 6:00.

Q. Do you know that you got there at 5:00 o'clock that Sunday morning?

A. Oh, yes.

Q. How do you know that?

A. I looked at the clock, because all the fishermen were going out that Sunday, and that's the fishing parties every Sunday, and I know that they go out on Sunday and I've got to be there early to go to work.

Q. What time did you get there the next morning. Monday morning?

A. About 8:30 or 9:00 o'clock. I wouldn't know what time.

Q. You know you didn't get there at 5:00 o'clock?

A. No, not on Monday.

Q. How do you know that?

A. I was sleeping that time.

Q. You were asleep? What time did you get there Tuesday morning?

A. I don't know. I wouldn't know—about 5:30, 6:00 o'clock. I never looked at the time. I'm the boss and I go in when I want to.

Q. So you actually don't know what time you got there, and it varies, is that right?

A. Yes, but on Sunday I always go early. I always go early on a Sunday.

[fol. 240] Q. And you always go late on Monday?

A. That is right.

Q. Mr. Terrebonne, when did you first see Mr. Paris Theriot that Sunday?

A. You mean that deal to buy the car?

Q. When did you first see him, what time?

A. Around about 1:00 or 2:00 o'clock. After lunch. I wouldn't know what time exactly.

Q. Did you and Mr. Theriot have lunch together?

A. No, sir.

Q. It was after whose lunch, yours?

A. My lunch. No, I went home and I ate dinner around about 1:00 o'clock, and I came back. I don't know what time.

Q. Where did you eat dinner?

A. At our house.

Q. You don't eat in your restaurant?

A. No.

Q. You don't eat your own food?

A. No, sir. That's why I got married for.

Q. Mr. Terrebonne, do you think that it was 1:00 or 2:00 o'clock?

A. I don't know what time, 1:00, or between 1:00 and 2:00 o'clock.

Q. Between those hours?

A. That's right.

Q. Where was he when you first saw him?

[fol. 241] A. He came in my office.

Q. Where is your office located?

A. Next to the Fishermen's Bar.

Q. Do you have an office right adjoining the bar?

A. In the middle, between the restaurant and the bar.

Q. Where is the warehouse located?

A. Way in the back.

Q. Back of what?

A. Back of the building.

Q. It is not joined to it?

A. That is right.

Q. It was joined to the—

A. All together, yes.

Q. Did Mr. Theriot come in your office or did you meet him out in the bar or restaurant?

A. No, I was in the office. He came in my office.

Q. What did he say to you when he first walked in?

A. When he first walked in, I just tell him hello and we started talking.

Q. Did you send for him? Did you know he was coming?
A. No, I didn't send for him.
Q. When had you last seen him before?
A. The last time I saw Mr. Theriot, I wouldn't remember.
Q. Do you see him quite often?
A. Oh, yes.
[fol. 242] Q. You don't remember when you last saw him before that Sunday? Was it a week, a month?
A. No, about three or four days.
Q. Three or four days? You had seen him every week? You see him every week?
A. Almost every week. If I don't see him in Grand Isle, I see him in Golden Meadow. I'm in Golden Meadow almost every day.
Q. You see him almost every day?
A. Not every day, sometimes, two, three, or four times a week.
Q. Three or four times a week, is that correct?
A. Yes.
Q. How many cars have you ever bought from Mr. Theriot?
A. Two cars and a station wagon.
Q. Two cars and a station wagon?
A. Yes, sir.
Q. Did you know he was coming down to talk to you about buying a car that Sunday?
A. Yes.
Q. How did you know that?
A. Well, I talked to him.
Q. When did you talk to him?
A. It was a long time, about three or four weeks, or maybe longer than that.
Q. What time was it when you bought the car, just be-
[fol. 243] fore this car that you bought?
A. How you say that again?
Q. When did you buy the car from him that you were using?
A. The one we were talking about buying, doing business with him?
Q. The one before that?

A. I wouldn't remember.
Q. What kind was it?
A. It was a green Oldsmobile, 98.
Q. That is the car you bought Sunday?
A. No, sir. That was the first one.
Q. You bought a green Oldsmobile from him before?
A. Yes, sir.
Q. What year was it?
A. '55 Model.
Q. You bought it that year?
A. Yes, sir.
Q. Is that right?
A. Yes.
Q. When did you buy the station wagon?
A. About eight months ago. Eight or nine months ago.
Q. Did you trade in any vehicle on this Oldsmobile that you bought that Sunday?
A. No. I sold it and I bought this last Oldsmobile with him.
Q. You mean you sold your green one?
[fol. 244] A. Yes.
Q. Who did you sell it to?
A. I sold it to Sidney Giselle.
Q. Did you sell it after the Sunday before?
A. No, before that.
Q. You had already sold your Oldsmobile?
A. Yes, sir.
Q. How long before had you sold it?
A. I wouldn't know. I don't know what date. I wouldn't remember all that.
Q. Was it a week, two weeks, a month?
A. Before I got this car? About two months. It was about two months.
Q. What kind of car were you using?
A. By that time I bought that green Oldsmobile with him I was still using the same car, when I sold it, until I get my other car.
Q. You just didn't deliver it? You had sold it but you didn't deliver it?
A. No, I didn't deliver it.

Q. How long did it take you to make a deal with Mr. Theriot that Sunday?

A. About forty-five or fifty minutes, maybe less than that. It didn't take very long.

Q. Did he set the price or did you all negotiate or—

[fol. 245] A. We made a price.

Q. Did you make an offer and he accept it, or did he tell you it was going to be so much?

A. He offered me so much.

Q. Did you agree with that or—

A. No—I agreed with him.

Q. You agreed with the price he quoted you?

A. Yes, sir.

Q. You didn't ask him to cut that any?

A. No, sir.

Q. How much did you pay him, for it?

A. About $3200.00—$3300.00.

Q. How much?

A. About $3300.00. That's without the financing and insurance, now, just the car.

Q. How much cash did you give him?

A. The same amount that I sold my car, $1500.00. It was $1500.00 down.

Q. Did you give him that money that Sunday?

A. No, sir.

Q. You just made the deal?

A. Made the deal and that was all.

Q. When did you pay him the $1500.00?

A. When I got the car.

Q. When did you get the car?

[fol. 246] A. About two months after.

Q. About two months after?

A. Yes.

Q. Mr. Terrebonne, has Mr. Theriot ever loaned you or your brothers any money?

A. No, sir.

Q. Did he ever endorse any notes?

A. No, we never borrowed. My brother borrowed from the bank and he stand good for the notes.

Q. He endorsed the note?

A. Him and Alan Tomple and Mr. Walter Templet.

Q. And Mr. Paris Theriot endorsed your note?

A. That's right, him and Templet.

Q. How much did you borrow, and where did you borrow it from?

A. From the State Bank in Golden Meadow.

Q. How much was that?

A. $20,000.

Q. $20,000?

A. Yes, the first time.

Q. And Mr. Paris Theriot endorsed that for you along with—

A. Along with Nolan Templet, yes.

Q. Did you give him any security?

A. No, sir.

Q. You were all good friends and he wanted to help you out?

[fol. 247] A. Well, I do a lot of business with the Theriot people, and that's the reason why he did it.

Q. What kind of business do you do?

A. Garage business. We bought all our trucks there.

Q. You are a customer of his?

A. That's correct, the Theriot people.

Q. How much business do you do with him?

A. I wouldn't know at the moment, right now.

Q. How many trucks have you got? How many trucks have you bought? I understood that it was just a panel truck, but have you bought more than the panel truck?

A. We bought two trucks from him.

Q. What kind were they?

A. Chevrolet.

Q. Two Chevrolet trucks?

A. Yes, sir.

Q. Did you buy any other cars from him?

A. My brother bought a car.

Q. All the Terrebonnes do business with Mr. Theriot?

A. No, except one of my brothers, Maurice Terrebonne doesn't buy his cars there.

Q. He doesn't buy any from him?

A. No.

Q. Did you pay this money back to the bank?
A. I paid by notes.
[fol. 248] Q. Have you paid the notes to the bank?
A. Yes, that is right.
Q. Have you paid the entire $20,000?
A. To who?
Q. Have you paid back the amount of money that you borrowed from the bank and which Mr. Theriot endorsed for?
A. I wouldn't know right offhand. I would have to check over my books to see how it is, if you want that.
Q. Have you paid any back?
A. Sure. We paid every month, the amounts.
Q. How much do you pay a month?
A. $500.00.
Q. When did you borrow this money?
A. I wouldn't know the date.
Q. Approximately when was it?
A. Well, when we first opened, about three years ago.
Q. Has he ever endorsed any other note for you?
A. No, sir.
Q. What did you use the money for?
A. To buy the property.
Q. The property where you are located?
A. Where we are located right now.
Q. So you are very good friends with Mr. Theriot?
A. I'm very good friends with all the Theriot's.
Q. When you left your place of business around 5:00 [fol. 249] or six o'clock, Mr. Theriot was still there, as far as you know?
A. I wouldn't know.
Q. And you said that it took you about forty-five minutes to close this deal?
A. About.
Q. Did you see Mr. Theriot after that?
A. I saw him one time during the day.
Q. One time during the day? Where was he then?
A. I saw him on the wharf.
Q. You never did see him in the bar taking a drink?
A. I never go in the bar on Sunday. There's very seldom I go in the bar.

Q. Did you see him take a drink?
A. No, sir.
Q. You never did see him take a drink?
A. No, not that day.
Q. Did you have a drink with him?
A. That day, no.
Q. Isn't it a fact that you actually bought him a drink?
A. No, sir.
Q. Did he buy you one?
A. No, sir.
Q. You mean you didn't have a drink?
A. He never buy me a drink. I'm too busy all the time on Sunday.
[fol. 250] Q. You are too busy to drink on Saturday?
A. No, sir.
Q. Well, what do you drink? What day do you drink?
A. Any time when I'm in town.
Q. You come to New Orleans to do your drinking?
A. When I'm in the business I don't do any drinking.
Q. That is not a bad idea.
Mr. Terrebonne, you never did see him other than when he was on the wharf, after you made your deal?
A. That's right.
Q. You never did see him again?
A. No.
Q. Where was his car parked?
A. His car, when I saw him, in front of the building.
Q. In the front of your building?
A. Yes, sir.
Q. It wasn't in the back?
A. No, it was in front. When I walked back down there and I came back, going by the restaurant, and I passed by the front of his car, I saw that it was scratched up in front.
Q. Was that before you made the deal or after?
A. After.
Q. After?
A. Yes, sir.
Q. He didn't take you riding in it?
[fol. 251] A. No, sir.

Q. And you knew what you wanted?
A. That's right.
Q. You knew you wanted a 98 Olds?
A. Yes, sir.
Q. What color did you buy?
A. Red and white.
Q. You bought red and white?
A. Yes, sir.
Q. And you sold your green?
A. That's right.

Mr. Brumfield: That is all. Thank you very much.

Redirect examination.

By Mr. Hughes:

Q. Mr. Terrebonne, I want to ask you a few questions about the $20,000 loan.

I want to ask you, was that loan secured other than by the endorsement?

A. I can't get you.

Q. Was the loan secured by anything other than the endorsement?

A. Well, we borrowed the money for buying the Seafood Company.

Q. Did you give a mortgage on the property?

[fol. 252] A. Sure.

Q. Who is Nolan Templet?

A. He is the Gulf distributor. He handles the Gulf.

Q. He is the Gulf distributor in Golden Meadow?

A. Yes, that is what we deal with.

Q. So he and Paris Theriot endorsed your note?

A. That's right.

Q. And the note also was secured by a mortgage on the property?

A. That is correct, $20,000.

Mr. Hughes: That is all.

Mr. Brumfield: No questions.

The Court: You are excused, Mr. Terrebonne.

Mr. Hughes: That is the Defendant's case, your Honor.

DEFENDANT RESTS

The Court: The Defendant rests.

Mr. Brumfield: May it please your Honor, by agreement of Counsel it is stipulated that the amount of the funeral bill for the burial of Byrd Mercer was $700.00. I overlooked asking Mrs. Mercer the amount, and it is stipulated that that is the amount. Is that right?

[fol. 253] Mr. Hughes: Yes, that is correct.

The Court: Does the Plaintiff rest?

Mr. Brumfield: We rest.

The Court: Left in the case is the summation by Counsel, followed by the instructions of the Court.

We will take a short recess now to go over the requested charges of Counsel, after which we will begin the summation immediately.

We will take a ten minute recess.

(Short recess.)

(After recess.)

The Court: Do not call the Jury yet.

Do you have a motion?

MOTION FOR A DIRECTED VERDICT ON BEHALF OF DEFENDANT AND DENIAL THEREOF

Mr. Hughes: If the Court please, I would like to move for a directed verdict on behalf of the Defendant, and the basis of this motion is, first, that the manner of the decedent's death has not been proved. There is no evidence in the record to show that the deceased was killed by an automobile, or the place of his death has not been shown, but only the fact that he was injured on the side of the [fol. 254] highway or where he was found.

Further, there is no evidence in the record as to the time of his death, because although the death certificate says 7:30, the same Coroner's report gives the date the following day. There is evidence in the record that he died on December 18th as well as on December 19th. So on the theory that the Plaintiff has not proven that the deceased was killed by being struck by an automobile, he has not proved that he was killed within the limitations of time when the

Defendant was on the scene of the accident, and he has not proved where the accident took place, I move for a directed verdict on those grounds.

The second ground is this, that there is absolutely nothing in the record upon which the Jury can base a conclusion that the plaintiff was negligent. The only evidence in the record as to the Plaintiff's actions at the time he passed this place where the body was found, if your Honor is going to take that as the place of death, is that at that time he was proceeding in a careful, cautious manner, that he didn't run off the road, that he didn't stop suddenly, and he didn't do anything except that he was going straight down the road in a careful, cautious manner. So I say to the Court that there is absolutely no evidence in this record upon which the Jury can base an inference of negligence, even though the Jury by circumstantial evidence, which I deny, could [fol. 255] come to the conclusion that the Plaintiff's automobile struck the decedent. I don't think there is sufficient evidence to base that conclusion either, but particularly not sufficient evidence for any presumption of negligence, and the burden is on the Plaintiff to prove negligence, not on the Defendant to disprove it.

The Court: Well, you'll have the opportunity to develop those points, if necessary, within ten days after the Jury brings in its verdict.

I will deny the motion.

Offer in Evidence, Marked "Excluded"

Mr. Brumfield: At this time I would like to tender evidence to the effect that Mr. Paris Theriot has struck and killed two people prior to the occurrence of this accident, which gave rise to this case. We have taken a deposition of Mr. Theriot and those facts were developed in the deposition. So, if it is agreeable with your Honor and opposing Counsel, I would like to offer that portion of the deposition that develops that, out of the presence of the Jury, because your Honor informed me that if the matter was gone into at all that you would order a mistrial, so I tender that in order to show that I did have this evidence, and the record will be complete.

Mr. Hughes: To which offer the Defendant objects on the ground that it is irrelevant, immaterial to the issues of this [fol. 256] case, and the only issue in this case is the negligence of the Defendant at the time and place charged in the petition.

The Court: Let the record show Counsel did make an offer while Counsel for both parties were at the Bench with reference to proving prior accidents, and prior alleged homicidal accidents resulting from the activities of this Defendant in connection with the operation of an automobile, and that Counsel for the Plaintiff was instructed at that time that that evidence was inadmissible, and if that evidence came out even without any prompting from any witnesses, then there would be a mistrial declared immediately.

Counsel does have the right under 43 (b), however, to make a record of the excluded evidence, and pursuant to Rule 43 (b) the Court will allow the deposition, all those pertinent parts of the deposition which refer to the past activities of the Defendant with reference to accidents in which he was involved while operating an automobile. The Court will allow that part of the deposition to be in evidence for that purpose, but, however, marked "Excluded."

Call the Jury back.

(Whereupon, the Jury returned into the Courtroom.)

Proceedings

The Court: Ladies and gentlemen, we have come to the [fol. 257] summation of the evidence by Counsel. Counsel for the Plaintiff opens followed by Counsel for the Defendant, followed by a short rebuttal by Counsel for the Plaintiff.

You may proceed.

Summation of Evidence on Behalf of Plaintiff

Mr. Brumfield: May it please your Honor, and ladies and gentlemen of the Jury: As his Honor has explained to you, this is the final phase of this trial. In a very short time, after you have heard the remarks from me and Mr. Hughes, his Honor will instruct you and then it becomes your re-

sponsibility to reach a decision in this case, and just as surely as I am standing here before you, and just as surely as you are sitting here in this Jury Box, and as sure as there is a God in heaven, Paris Theriot killed Byrd Mercer.

There are only two conclusions that can be reached: First, he did it and he knew he did it. He manipulated alibis, cover-ups. A hit-and-run—he killed and fled; or, you may conclude, and I would actually prefer to believe this, that Paris Theriot was so drunk that he actually didn't know he had run over this man and killed him. They were all like a nightmare to him—a nightmare enshrouded in alcohol, if you will; that he was in such a condition that he really couldn't say to himself. He may really think that he did it, but he wasn't positive, and it was just like a bad dream and a nightmare hit him. Therefore, that is the rea- [fol. 258] son that he denies that he did it.

But, ladies and gentlemen of the Jury, the facts and circumstances, the physical evidence, stronger than the words out of live witnesses, if you will, because it is not accompanied by the human failure, prejudices, and the physical fact—it all fits in, like the parts of a jigsaw puzzle, one by one. It fits in.

First, the timing, around 7:30 on that Sunday night, December 18th, 1955. Both, Mercer and Theriot, in so far as the timing is concerned were there on that highway. The place is there. Mr. Mercer, the deceased, and Mr. Theriot were on that highway at the same time. Mr. Mercer was walking and Mr. Theriot was driving his car, and it was raining, a dark, foggy night.

Then, the physical facts—the type of damages to this automobile. You need have nothing more but to look at these photographs, and thank God that these didn't get misplaced and lost, or disappeared, because on these photographs, as you have seen yourself, you see the tire marks, and you see the position of the body, and there can be no question at all that Byrd Mercer was run over, crushed. His life snuffed out by an automobile. And, looking at the damages on Theriot's car from these photographs, and not by any witnesses, the type of damages that are on this car, there can be no other conclusion, ladies and gentlemen of the Jury, other than this type of damage was made by the strik-

[fol. 259] ing of a human body (indicating on photograph), and no sharp back end of a truck could have caused this damage. If that had been a 12 x 12 or a 6 x 6 flying out of the body of the truck and hitting this (indicating) we know from our own common experience that that windshield would have been absolutely knocked out. There would have been a sharp indentation made by a nail, made by this spike, made by this sharp piece of wood, but that is not so because these facts belie that fact. It was an indentation made by a human body. There it is for you to see (indicating on photograph).

These scrapings (indicating on photograph) these scrapings that were taken from this car, the blue dye matching the blue denims, the overalls that Mercer had on, conclusively prove that Mercer's body was struck by this particular automobile. This hair, and this blood—all these officers couldn't identify that as such, but it looked like it to them. They came from the body of Byrd Mercer.

And, this old Dutch Cleanser, how that rings out in this case of an attempt to wash off the evidence, and then this mysterious disappearance of this evidence. Had it been sent to the laboratory as it should have been, then there would be no question. Absolutely no question but that Paris Theriot would have been proved beyond any peradventure of a doubt that he struck and killed this man. But, it disappeared. What a bizarre case. What a travesty on justice has occurred. But, ladies and gentlemen of the Jury, [fol. 260] Paris Theriot is not here before you on a criminal trial. You are not called upon to try him and let him account to society for his act. This is a civil action for damages that he inflicted on this surviving widow, and you are not called upon to use the same test that you would be required to do if it was a criminal action. In other words, if you were called upon to pass on the guilt or innocence of Paris Theriot as to whether or not he was guilty of negligent homicide or of manslaughter, then you would have to resolve all doubt—it would have to be proven beyond any reasonable doubt, and the scale would have to be tilted all the way against him in a criminal action, whereas in a civil action, such as this, you can still have some doubt in your mind, but if a preponderance of the evidence, if all the

facts and circumstances, using your own good judgment and your own good conscience you your common sense, if the preponderance of that tends to show and prove that Paris Theriot was responsible for the damages he inflicted, then it is your sworn duty to bring in a verdict in favor of this Plaintiff in this case.

You will recall at the beginning of this trial, you were asked whether or not you would make such finding taking circumstantial evidence, because believe me, ladies and gentlemen of the Jury, if we had been able to find an eyewitness, he would be here, but the only eyewitness to this tragedy was with the deliberate eyes of a hit-and-run driver, [fol. 261] or the blurry, bleary eyes of a drunk man. There is no escape in reaching that conclusion.

And these alibis! That would influence me to come to the conclusion, and I'm sure you have yourselves, that Paris Theriot was driving home that night, and that he knew that he had run into something, that he had run into Byrd Mercer not knowing who he was, there is not doubt, but he knew that he had run over someone, and he kept going. That alibis! The first alibi he gave was that he wasn't even on the Island that night at the time that this man was killed, at 7:30. He wasn't even there. But then he was confronted with so many witnesses that he was down there in this Fisherman's Wharf, and he was on this Island, that he admitted that he was.

You remember from the statement that Officer Prudhomme gave the insurance adjuster, the fact that I didn't even know myself until the trial of this case, that Paris Theriot first said that he wasn't even there, but it has been proven without any doubt that he was there.

Then he admitted to his good friend Nelson Guidry, in front of Deputy Millett, and this co-worker Miller, that he had hit a cow, or some animal. Then, when he was asked by Officer Prudhomme, "How did you wreck your car?" Then he gave this fantastic story of hitting a truck along the highway, on a Sunday before, and in broad, open, daylight, around noontime. No other cars coming—an open [fol. 262] highway—and yet he ran into the back of a truck. You heard what he said, that his car ran off of that highway and then came right on back, that he didn't stop the truck,

and he didn't know what kind of truck it was. He didn't know what color it was. He turned around and came on back and went to Grand Isle.

Then, you heard this last officer that took this stand. He said that a car couldn't have done that, positively that it could not have done that. It had to be pulled out of there, that thick chocolate-covered mud. That, in itself, proves that Paris Theriot is lying. There can be no escape in that conclusion.

So we say, from all the facts and circumstances, putting these together, and drawing reasonable inferences from it, and that is all we are required to do because that is all we could do. Everywhere, all we met was cover-up, lost evidence, vagueness, "I don't remember whether it was a result of a political contribution or pay-off", something just happened. I think you will agree with me that something happened, and what happened was in his favor. It didn't happen to favor this surviving widow, or to bring back Byrd Mercer on this earth from the grave.

You can certainly reach an inference there. Inescapable. Evidence of that kind just doesn't disappear, because, had it been sent to the laboratory and not destroyed, we wouldn't be here today, because there would be absolutely no ques-
[fol. 263] tion, and the way things have worked out, the evidence that we have been able to get, the facts and circumstances surrounding this whole thing, these manufactured alibis, designated and shown to be in a true light as false, the facts and circumstances, the physical evidence, the type of indenture, the type of damage to this car, the blue dye on the car, the blood and the hair on the car, the Dutch Cleanser on the car, even though they didn't go to a laboratory, we had evidence of the fact that they were obtained from this automobile, and that type of evidence couldn't come from hitting the rear end of a truck, ladies and gentlemen. That type of evidence couldn't come from hitting a truck. It just couldn't have. And, the only logical, reasonable, common sense conclusion is that Paris Theriot did it, either deliberately or not knowing that he did it, but he is just as responsible in either instance. He didn't have the right to run over and kill this thirty-two year old man, but that is what he did. There is no other conclusion to reach but that.

By the same token, by the circumstances and by the evidence, and by the inferences that you can logically and with common sense draw from the entire situation, there is no other conclusion to reach but that Paris Theriot was negligent. He ran into the back, ran over, Byrd Mercer. He didn't keep a proper lookout. He didn't have his car under control. He was too drunk. He had a complete dis- [fol. 264] regard for human life, whether it was deliberate or by the act of those Scotch and waters that he drank, and he has to be held accountable for it in damages. You heard him state that he has a public liability insurance covering that car to pay for damages that that car causes while he is operating it, if it is caused by his negligent act, which has been proven to be the case here. So even in the accounting that we are asking for now, he has an insurance policy to pay it for him.

To me it is significant also, ladies and gentlemen of the Jury, to show a guilty conscience. You heard him admit that he transferred and sold his business to his brother effective December 31st, 1955, after this accident had occurred on December 18th, 1955. If the man was innocent, he wouldn't be going around attempting to get his property beyond the reach of seizures, and I charge that that is what he did in this case.

Ladies and gentlemen of the Jury, if it was within your power, and I know I speak from the very heart of this lady sitting here (indicating), if it was within your human power to bring back her first love, that is what she would ask you to do. You can't do it, and in our society, and under our system of laws, the only restitution that you can make, all that you can give is to make an award in cold dollars for a human life. What is a human life worth? How much is your life worth, or yours (indicating) in dollars and [fol. 265] cents? Are we worth so much a pint, so much an inch, or a foot? We can go out here to the race track, and they have values on these race horses, fifty, one hundred, two hundred, a thousand dollars, on these breeding bulls, cattle, chickens, dogs, automobiles, boats, airplanes. We don't have too much trouble figuring out the value if one of those were destroyed. But, a human life, the right to live, what is more precious than that.

Look at that (indicating on photograph). A life crushed out, with his face in the ground, his body crushed. What would he place on his life right now, wherever he is? And what would you place, what price would you place on your own life? What is more precious than the right to live? That is what has been destroyed here—the right to walk on the face of this earth, and the image of God uprightly, breathe fresh air, look at sunsets, and in the evening stare at full moons, and to work and labor, and to love and be loved. Did you ever stop to think about that? We take so much for granted in this life. Yet, life is almost like a spasm, from birth until death. It is so fleet. Each precious moment—thirty-two years old. He had a right to live his fourscore and ten. He was placed here on this score, and nearly forty years he had the right to live on this earth. Yet, at thirty-two some irresponsible killer and fleer, hit-and-run, destroyed him, and took that right away.

[fol. 266] The only way, ladies and gentlemen of the Jury that you can rectify this wrong, this injustice—not from any punishment, no, we are not asking that; we are asking that you make an adequate award for the damages that this widow sustained—her first love. No one else will ever take his place. She was dependent on him for support. He made $150.00 a week. They loved each other. They lived together as man and wife.

She cannot be condemned, and I am sure that he doesn't I'm sure Mercer would agree right now if he would explain this with us at this moment, that he was glad that she did remarry. That doesn't take away from the damage that she has sustained from this loss of love, this intangible thing of companionship and love for a man and a woman and a woman and a man. It is as precious as life itself. That has been destroyed, and as I told you at the outset, we ask that you render an award to her in dollars and cents.

This inflationary period that we are in, a dollar is not worth a dollar, but we use that measure—it is only worth a half-dollar, or less, but you take that into account, if you will. We ask that you fix that damage, and those damages in the amount of $118,700.00. You may say, "Well, oh, that is too much," or, "That is astronomical," as my opponent may say, but if you don't agree with that, it is up to your

own good conscience to put a price tag on this snuffed out life.

And I do beg and implore you, because this is the only, [fol. 267] this is the last, this is the one day that this widow has a right to go before any Court throughout the land and ask that this wrong be righted. This is her day in Court. It is your responsibility, and it is a grave responsibility, and I say to you ladies and gentlemen of the Jury, if you disagree with the amount that is figured there, you use your own good judgment, your own good common sense, taking into account the great loss that this widow has sustained, love and affection, and companionship, and the support that has now been taken away from her, and I implore you and beg you and plead with you to make the award adequate. Let's right this wrong here and now, and please, ladies and gentlemen of the Jury, and I implore you this, and don't compromise, if you will, and bring in an award of at least $50,000.

Summation of Evidence on Behalf of Defendant

Mr. Hughes: Your Honor, and ladies and gentlemen of the Jury: The Plaintiff has told you that Mercer met his death at the hands of Mr. Theriot over there (indicating). The Plaintiff has not told you that he has to prove that, and he has to prove that it resulted from the negligence of Mr. Theriot. But let's see here what his evidence does prove.

The death certificate in the record says Mr. Mercer died 7:30 P.M. on December 18th, 1955. Does anybody know that? Have you heard anything here in this trial which would tell you that? The Exhibit P-2 filed by the Plaintiff, [fol. 268] signed by the Coroner said that death occurred 10:15 A.M. on December 19th, 1955. The Coroner's Office Day Record in evidence as P-3 says that the death occurred on December 19th, 1955, and a notation on it, "Body found 6:30 A.M., 12-19-1955". And, a further notation, "Deceased last seen 7:15 P.M., December 18th, 1955." Now, in fifteen minutes this deceased is to have walked from the place where he was, at the Fisherman's Wharf, to the place where his body was found, and there Mr. Theriot was to have left, where he was, just in time to reach those points simultane-

ously. Even the day that Mr. Mercer died hasn't been shown in this Court.

As far as the actions of the deceased are concerned, when we review his actions and try to find out what did happen, we find that we don't know anything. He had come in from the work out on an oil rig with his co-workers. He customarily, as testified by his wife, got a ride to the tourist court where he was staying. Mr. Miller also corroborated that he customarily drove. Miller doesn't know, and he was the only witness, what time he left this place. He knows he was there, and the next thing he knew, he was gone. Now, the evidence was that he lived four or five miles from this restaurant where he was. He customarily rode, got a ride. The testimony doesn't show that he left in an automobile, or whether he left walking, whether he left alone, or in fact, even that he left. The only thing the testimony tells you is that Miller saw him, and a few minutes later he didn't see him.

[fol. 269] I ask you, in the rain, and you have heard a lot about blue denim clothes, but in the rain was it logical to assume Mr. Mercer was going to walk the four or five miles to his home without a raincoat? There has been no evidence of a raincoat, and that nobody would see him walking along that highway. I don't know and you don't know what happened to Mr. Mercer. Plaintiff doesn't know what happened to Mr. Mercer. Plaintiff wants you to believe that Mr. Theriot ran into him and killed him, but you have to rely on the evidence.

The time at which Mr. Theriot left the restaurant and bar is not fixed. It is a little uncertain, but, at any rate, he did leave and he left in his automobile. Now, I want you ladies and gentlemen to realize this, that until Maurice Terrebonne was put on the witness stand by the Defendant, there wasn't one iota of evidence in this record that this Defendant had even driven past the place where Mercer was found. By the side of the road, yes, but the location on the side of the road, no. Now, Maurice Terrebonne was driving right behind Mr. Theriot. You all heard his testimony—he was the last witness yesterday—and you can decide for yourselves what you think about it. He answered every question. He was polite. He saw the automobile. He testi-

fied he saw it. He testified that after Mr. Theriot passed him, and after he passed this place where the body was found, the next morning one or two more automobiles passed him, so we know there were a lot of automobiles [fol. 270] on the road that night, but we still don't know how Mr. Mercer was killed. We don't even know whether an automobile killed him.

If Mr. Mercer was killed at 7:30 P.M. on the night of December 18th, and you have the picture here in evidence, and his body was just two or three feet from the edge of that highway for a period of eleven hours before somebody saw him, it would be truly remarkable. Besides his body being there, if it had been there that length of time, we had clothing, a lunch pail, and other objects scattered up and down the road, but not one single, solitary person saw this body, so far as the record in this case shows, and so far as we know, until the next morning. When Terrebonne came back the next day at 4:00 o'clock, he still hadn't seen it.

Now, the fact that the body was found on the side of the road doesn't prove it that that is where the man was killed, or that he was struck by an automobile. You are asked to infer that. You are asked to draw that conclusion. You are asked to determine that this man set out to walk four or five miles in the rain, that he was struck by an automobile, that his body stayed on the side of the road for a period of about eleven hours, when nobody saw him, when he was in plain view. That is the theory of the Plaintiff's case.

Now, when we come to how this accident happened, we had two conflicting theories. We have a substance that no [fol. 271] one would swear it was hair underneath Mr. Theriot's automobile. We have a blue spot which was left out of the previous statement appearing on the hood. Now, Mr. Theriot's car couldn't possibly have run over him and then slid the man along the hood too. Either, if Mr. Theriot ran over him, it either ran over him or he hit him and knocked him off the side of the road, but both couldn't happen. So Plaintiff's own theory of the case are two mutually explosive theories.

Now, the uncertainties, and the uncertainties the Plaintiff realizes are shown in the question asked Maurice Terrebonne: "Did your car strike him". And you all heard that. You all heard that.

Now, as far as the investigating officers are concerned, I think we all agree that there wasn't a very good investigation in this case, but when you consider what those officers testified to, when you consider that not one single one of them gave any indication that Mr. Theriot did not cooperate in every way, when you consider that it was the afternoon before they got to Golden Meadow and he could have done anything he wanted with that automobile if he had been trying to hide it—he owned Theriot Motors, dealers for the same kind of automobile—but the automobile was sitting out in plain view on the highway.

Now, when we come to this evidence that mysteriously disappeared, even if the clothes and that bloody rag that was tucked behind the non-existing seat cover was thrown [fol. 272] on the floor, and the nail and the piece of wood which the deputy says he doesn't remember getting although the testimony was he did get it, if those clothes and those rags could still have been sent to the laboratory for examination, because, don't for a moment get the idea that the scrapings taken off of that car belonged to the Plaintiff, or that they were the Plaintiff's evidence—they weren't. Those scrapings were just as much Mr. Theriot's evidence as the Plaintiff's evidence.

Ladies and gentlemen, I am not going to try to tell you—I don't know—how Mr. Mercer was killed. I frankly don't know. I do tell you that there were many other people, and that everybody at Grand Isle on that night could have been suspects.

Now, you all know that the whole investigation centered around Mr. Theriot. Somebody was going to get Mr. Theriot. No charges were ever made. Nothing ever came of it except the civil suit, but evidently no attempt was ever made to find out what really did happen.

I am going to quote from the testimony of Prudhomme, "At the original scene of the accident there was a few young boys mentioned as hot-rodders; however, I left it to the local deputies to investigate." Now, the local deputy was Millett. You all heard Millett. He didn't investigate anybody except Theriot.

Ladies and gentlemen, fortunately you do not have to [fol. 273] decide how Mr. Mercer came to his death. All you

have to decide is whether or not it was caused by Mr. Theriot, and if it was caused by Mr. Theriot, that it resulted from the negligence of Mr. Theriot.

You heard the testimony about drinking. Certainly, he admitted that he took a drink, that he took a few drinks, but you heard the testimony of every person who saw him, that he was not in any way intoxicated, that he had full control of his faculties, and full possession of his faculties, and the statement that he was intoxicated, or that the evidence showed that he was, is not correct because that is not the evidence, and you heard it.

Now, Mr. Diaz will you finish.

Mr. Diaz: Ladies and gentlemen of the Jury: We are confronted here with a very strange situation. We have numerous people traveling a highway on Grand Isle, and we have numerous deputies and officials supposedly making an investigation. How many automobiles were looked at? Just one. One automobile on the entire Island of Grand Isle. Why is that? Why should all those efforts be directed against Mr. Theriot? We have Mr. Theriot's testimony that Mr. Millett told him in person, he said "I'm going to get you," and don't forget, who were the star investigators? Millett and Guidry. Guidry, who had no official capacity, the uncle of Millett. They were the super-sleuths who found [fol. 274] this substance under the automobile, and this supposed rag with the brown coloring on it.

But notice the conflict in the testimony. Mr. Millett claims that he arrived in Golden Meadow, returned to Grand Isle, then returned to Golden Meadow, and that is when he spoke to Mr. Theriot. But Mr. Guidry says that he immediately, when they arrived in Golden Meadow the first time, that is when they spoke to Mr. Theriot. Notice also that Millett was very careful to exclude every other witness from the hearing of the conversation that supposedly took place between Mr. Theriot and Millett. All of the other deputies were not there. They were present, but they couldn't hear, according to Millett.

The more surprising aspect of the entire case of the Plaintiff is the unknown whereabouts of Mr. Mercer for eleven hours. It is just as logical to presume that he fell from a helicopter as it is to presume that he was struck

by an automobile. There is not one shred of evidence to place Mercer and Mr. Theriot's automobile at the same spot.

The Counsel for the Plaintiff has indicated that there was some blood in the automobile. There was no testimony to that. There was no blood on that automobile.

Counsel for the Plaintiff has indicated that this is Mrs. Mercer's day in Court, but, ladies and gentlemen, this is also Mr. Paris Theriot's day in Court.

Ladies and gentlemen, it becomes very difficult to try [fol. 275] to prove a negative. It is not incumbent upon us to establish evidence to show that Mr. Paris Theriot was not responsible. That responsibility rests upon the Plaintiff, and how can you counteract a void, an absolute void for eleven hours? Nobody knows about Mr. Mercer or his body, or what happened to him. We don't know. Nobody knows. Yet everybody would have to believe that Mr. Theriot is responsible.

Ladies and gentlemen of the Jury, I submit it to your reasonable judgment, and ask for a verdict for the Defendant.

Rebuttal on Behalf of Plaintiff

Mr. Brumfield: May it please your Honor, and ladies and gentlemen of the Jury: Just a word, one last word on behalf of this surviving widow. There is one person who knows. I may not know, and Mr. Hughes may not know, and Mr. Diaz may not know, but in addition to the great Lord above, there is one person who knows, and that person is sitting right over there (indicating). He knows where Mercer was those eleven hours. He knows. If he would tell the truth, he would admit it. But he didn't. But we had enough evidence, thank God, to present here to you so that you could know, and you do know, just as surely as you know anything on earth, that Paris Theriot killed this man.

Then, this about falling from a helicoptef. Look at the tracks where the body was found, right in the path of where this body was. I am surprised that even a semblance of defense would be that Mercer wasn't run over by an auto- [fol. 276] mobile. That is just as conclusive, proven from the physical evdience. There it is for you to see (indicating on photograph). It is from this evidence that fits in every

manner, and points to Paris Theriot. He was the one. All of them knew it. These officers knew it. They had the goods on him. His alibis were exploded—they were lies. They had the evidence. Then what happened to it? It disappeared.

All of these things point inescapably to the conclusion that Paris Theriot caused the death of Byrd Mercer. What more act of negligence can you think of than for a man to drive down the highway in an automobile and run over somebody walking in front of him, hitting him from the back? Then, the way the body was, and this explanation as to how that body was tossed. You hit a body, animal, or anything else, and maybe some of you have had experiences in hitting cows or dogs, and when you hit an object it can fly every which way, and that is what happened here. It is tossed up, and it is logical to assume that striking the hood and then dropping back momentarily, and Mr. Theriot in his horror could have jammed the brakes and threw the body forward. All of a sudden he had a body on top of the hood, and then just throwing it down and then proceeding on-hitting and running over that body. I don't know.

The evidence proves beyond a peradventure of a doubt that it was the negligence of Paris Theriot that caused the untimely death of this man, and I am just as convinced that [fol. 277] the disappearance of this evidence is related—it disappeared. And, I am just as convinced that he used some old Dutch Cleanser to wash that blood off. If we had that evidence we could prove it to you conclusively.

So I say to you, with one other word, need I say more? From Terrebonne's own lips, if a man would endorse a note for me for $20,000, I guess I would feel obligated too.

There it is. You don't think I need to say any more than that? You saw Paris Theriot himself. You heard him. That was enough.

So, it is in your hands. You now have the responsibility, and with all the sincerity of my command I implore, I beg you to render justice in this case. Not in the form of punishment but as you have the legal responsibility to do all that you can do within your human limitation, and that is to translate this life, this human being made in God's own image, crushed, killed translate that life into dollars and

cents. And I beg you, don't compromise. Make your award at least $50,000.

Thank you very much.

JUDGE'S CHARGE

The Court: Ladies and Gentlemen: You have heard all of the evidence of the witnesses and the arguments of both sides, and now it becomes my duty to define the law applicable to the facts in evidence in this case, and to instruct [fol. 278] you as to the rules of law which you are to consider and by which you are to be controlled in weighing and construing the testimony. It is for you, and you alone, to determine what the facts are. It is for the Court, and the Court alone, to define the law by which these facts are to be applied in the instant case.

If, perchance, you shall have imagine or gained the impression that at anytime during this trial that the Court had any opinion respecting what may or may not be a fact in this case, you will still remember that the Court's conclusion is in no sense to weigh with you or to control you in your finding and determination of what the facts really are. If during this Charge it seems to you that emphasis is laid or not laid upon some fact, pay no attention to such an impression, because it is not my purpose to create it. I trust that you will not handicap your consideration of this case by any apprehension that it will be difficult for you to understand it, or to apply the facts as you find them to the law as I shall give it to you. I think you do understand this case, and if you do not now, I am certain it will be clear when such additional light as is needed is given you in this Charge. You must remember that you are to look at the facts and apply the law to them as given you by the Court exactly as you would look at other important concerns affecting yourselves. You should approach the consideration of the whole case with a confidence that you will arrive at a conclusion satisfactory to your judgment, and to [fol. 279] your conscience, precisely as you are satisfied that you will arrive at a like conclusion in any important matter of your own after you have given it full and careful consideration.

There are no distinctions to be drawn in this case so fine that the ordinary man or woman cannot apprehend them; nor are there any mysterious processes, either of reasoning or of legal procedure, which you need fear will cloud your inquiry or interfere with your arriving at a perfectly intelligent conclusion. The questions here are practical questions for you to decide, and all that is needed is that you give your very best attention to this consideration.

There are, however, certain limitations which are put upon you. You have no right to consider anything which you have not heard in the Jury Box. If you permit yourselves to be influenced in any way by considerations which have not come before you here, you run a danger of doing a great injustice to one side or the other.

There is another consideration which it is proper for me to refer to in this connection. You must distinguish between the mere arguments of Counsel which are made before you, and the evidence upon which those arguments rest. The repetition of an argument, however often, does not constitute evidence. You must carefully analyze the assertions which are made to you by either side, and see what basis those assertions have in the evidence. If you [fol. 280] will, therefore, not assume anything to be true which has not been proved, and if you will not assume when I ruled out a question that the answer would have been one way or the other, and if you will carefully see to it that all the conclusions that you make have some basis in what you have heard here, you will be doing your duty. But, if, on the other hand, you draw inferences from any questions which have been ruled out, or from any question which has been answered more than has been answered, you will run a risk of real injustice.

There are some general principles of law which are of importance in every civil case, and I shall first say a word to you about this. The law imposes the burden of proof on one party or the other in all cases. In a civil action such as this, the present case, the burden of proof is upon the Plaintiff to prove the justice of her claim by a fair preponderance of the evidence, and by a fair preponderance of the evidence is meant that evidence which has the greater weight, that evidence which best accords with reason and

probability. In other words, proof beyond a reasonable doubt is not required. Proof to a reasonable certainty is sufficient.

The machinery of trial calls for the exercise of varying functions by Counsel, by the witnesses, by the Court, and by the Jury. You, as the Jury, exercise two important and exclusive functions. First, as you have been told, you are the sole judges of the facts. That is to say, it is you who [fol. 281] must consider the evidence, weigh the evidence, and draw inferences from the evidence, but only from the evidence. Secondly, you exercise the exclusive function of passing upon the credibility of the witnesses. You can see that this is a very important function, because to determine where the truth lies you must, of necessity, decide who is telling the truth.

In weighing the testimony and in determining the credibility of a witness, the Jury may, among other things, consider his manner and demeanor on the witness stand, his feelings, interest, prejudice or bias, if any; whether he is impartial or otherwise, and whether he has a purpose or interest to serve which might color his testimony: his means of knowing what he has testified to; the probability or improbability of his testimony, the consistency or inconsistency of his statements, and with the other facts proved in the case, the reasonableness or unreasonableness of his testimony considered in the light of the circumstances surrounding that testimony, including whether or not he has been contradicted by other credible evidence and whether or not he has made statements at other times and places contrary to those made on the witness stand. The Jury is not bound to believe unreasonable statements just because they are sworn to, for we know that anyone can swear to anything if he has the will to do so.

If conflicts in the testimony of the witnesses exist, it is your duty to reconcile these conflicts without imputing [fol. 282] perjury to anyone, if you can reasonably do so; but, if you find that a witness had willfully and falsely testified regarding material matters, you should, of course, disregard that false testimony and you may, if you choose, disregard any and all testimony given by such witness, unless it is corroborated by other credible evidence or by facts

and circumstances in evidence. The credibility of the witnesses and the weight of their evidence are matters solely for your determination. The Court cannot help you on this. You are the exclusive judges in determining where the truth lies.

This brings us directly to a consideration of the issues which this case presents. The issue here is very simple: Did the Defendant, Paris Theriot, kill Byrd Mercer? And, if so, was he guilty of negligence in so doing, which proximately caused that death? That is the sole issue here, whether the Defendant killed Mercer, and if he did, was the death a result of negligence proximately caused by the Defendant Paris Theriot.

The Plaintiff, the widow of Mercer, alleges, of course, that Theriot did kill her husband and that his negligence proximately resulted in his death, that is, Theriot's negligence. The testimony of all of the witnesses for the Plaintiff has made out what we call in law a circumstantial case, and you will consider the evidence in the light of these circumstances as they have been adduced from the witness stand.

You must remember, when you were empaneled as a Jury [fol. 283] you were told that circumstantial evidence is to be received with caution. It is to be weighed very carefully, but circumstantial evidence is good evidence, and when it shows by a preponderance of all of the evidence in the case the truth of a particular fact, then you must accept that fact. You must consider what other reasonable hypotheses there may be, and if this circumstantial evidence negatives the reasonable existence of such hypotheses, then you must accept the fact which this circumstantial evidence indicates. That is the case for the Plaintiff. The Jury has listened attentively to the facts. It has been a very short trial, and, consequently, the Court will make no effort to sum up the facts, since they have been so clearly summed up by Counsel for both sides.

The Defendant, on the other side, states categorically that he did not kill Byrd Mercer, that he had no accident at all on the highway in Grand Isle that evening when he left Grand Isle, and that he cannot be charged with negligence in this death because he was not negligent and he did not

kill him, that his car did not come in contact with him under any circumstances.

The evidence produced by the Defendant is to be considered just as the evidence produced by the Plaintiff. It is to be weighed along with the evidence of the Plaintiff. If the evidence is equal on both sides, then there must be a verdict for the Defendant, because then it could not be said [fol. 284] that the Plaintiff has proved his case beyond a reasonable doubt.

Now, both sides, as they have a right to do, have asked for special instructions. The Court will give some of these instructions and refuse others.

Now, taking the Plaintiff's instructions. The first is denominated "A" for the Plaintiff: You are further instructed that the first duty of those who operate motor vehicles is to keep a sharp lookout to discover the presence of those who might be in danger. Secondly, in performing that duty if they discover or by the use of ordinary care they could have discovered that someone was in danger, that it is their duty to use every possible available means to avert injury.

Number One for the Plaintiff is refused.

Number Two for the Plaintiff: You are instructed that in a civil case such as this case, the Plaintiff is not required to prove her case beyond a reasonable doubt. She is required only to prove the facts relied upon by a preponderance of the evidence. Preponderance of the evidence is a phrase which, in the last analysis means probability of the truth of evidence which is more convincing to you as worthy of belief than that which is offered in opposition thereto. The law does not require every fact and circumstance which make up a case of negligence to be proved by direct and positive evidence or by the testimony of eye-witnesses. Proof of the fact of negligence may rest entirely in circumstances; in other words, circumstantial evidence [fol. 285] alone may authorize a finding of negligence. Hence, negligence may be inferred from all the facts and attendant circumstances in the case and where the circumstances are such as to take the case out of the realm of conjecture and within the field of legitimate inference from

established facts, a prima facie case is made. The basic distinction between direct and circumstantial evidence is that in the former instance, that is, in the direct evidence, the witnesses testify directly of their own knowledge as to the main facts to be proved, while in the latter case, that is, the circumstantial evidence, proof is given of facts and circumstances from which you, the Jury, may infer other connected facts which reasonably follow, according to the common experience of mankind.

Number Three for the Plaintiff: Direct or positive evidence that Defendant's negligence caused the death of the complainant's husband is not necessary. In an action to recover damages for a death negligently caused, the relevant conditions and circumstances surrounding and relating to the occurrence may be considered by you, the members of the Jury, in the absence of direct proof in order that you may determine the inference, if any, they create. The Plaintiff is not required to offer evidence which positively excludes every possible cause of the accident. The existence of remote possibilities that factors other than the negligence of the Defendant may have caused the accident does not require a holding that the Plaintiff has failed [fol. 286] to make out a prima facie case. It is enough that she show facts and conditions from which the negligence of the Defendant and the causation of the accident by that negligence may be reasonably inferred.

Number Four for the Plaintiff is refused.

Number Five for the Plaintiff is refused.

Number Six for the Plaintiff is refused.

Number Seven for the Plaintiff is refused.

Number Eight for the Plaintiff is refused.

We now take the special charges requested by the Defendant.

Number One for the Defendant: Negligence is a breach of a legal duty. It will not be presumed, and the burden of proving it by a preponderance of the evidence rests upon him who asserts it.

Number Two for the Defendant: Verdicts cannot rest upon guess or conjecture and mere possibility or probability are not sufficient to support a judgment. It is the duty of the Plaintiff to allege and prove negligence affirmatively.

Number Three is refused.

Number Four: A Plaintiff relying upon circumstantial evidence is required to produce evidence which excludes, with a fair amount of certainty, every other reasonable hypothesis but the one relied on.

Number Five for the Defendant: In order to return a verdict for the Plaintiff you must find that the decedent was [fol. 287] struck, and his death was caused by contact with the vehicle driven by the Defendant. You must further find that the accident occurred as a result of the negligence of the Defendant and that such negligence was the proximate cause of the accident.

Number Six is refused.

Number Seven is refused.

Under the law, if a person by his negligence causes injury or damage to another, that person must repair that injury or damage he has done. Negligence, as the term is used, may be defined as the failure to do that which a person of ordinary prudence and intelligence would do under the same or similar circumstances. Or, negligence may be defined as the doing of that which a person of ordinary prudence and intelligence would not do under the same or similar circumstances. Negligence is the failure to use ordinary and reasonable care, and ordinary and reasonable care is that degree of care which the average, prudent person would exercise under the facts and circumstances involved in this case. I charge you further in this case that negligence is actionable only when it is the cause of, and the proximate cause of the injury received. That is to say, where the negligence proceeds in an unbroken chain without independent intervening cause up to the point of inflicting the injury or damage. That is the technical definition of proximate cause. It merely means the law takes no [fol. 288] cognizance of negligence which may be remote to

an injury or accident. It is only that negligence which actively, directly, and proximately causes the accident which gives rise to recovery.

Ladies and Gentlemen, I trust that the issues are plain to you. If they are not, and you wish me to clarify this charge in any detail or particular, or if there is any question which you may have, I shall be pleased to do so. I believe that you thoroughly understand the case and will have no difficulty in reaching a conclusion.

In order to simplify the matter further, the Court is submitting the case to the Jury on a verdict form. The verdict form reads as follows: "We, the Jury, find for the Defendant." If you find that Paris Theriot did not kill Byrd Mercer, then your verdict should be for the Defendant, and you should circle, "We, the Jury, find for the Defendant."

Even if you should come to the conclusion that Paris Theriot did kill Byrd Mercer, but that Theriot was not guilty of any negligence which proximately resulted in Mercer's death, then, still your verdict will be for the Defendant, and you should circle the first sentence shown on the form.

The second sentence shown on the form is, "We, the Jury, find for the Plaintiff in the amount of ....." If you find that Paris Theriot did kill Mercer, and that Mercer's death resulted from the negligence of Paris Theriot, which negligence proximately caused that death, then you would [fol. 289] find for the Plaintiff, and you will insert in the space provided the amount in which you find.

I charge you that damages are allowed not as punishment but as compensation for the injury sustained and should be commensurate therewith. Actual damages alone are compensable. There can be no recovery for speculative damages, and damages must be proved to a reasonable certainty. There is no yardstick you can measure the amount of recovery which should be had in any given case. That matter is left to your own judgment and determination, and you will arrive at a conclusion in the matter in the light of the evidence as you have heard it.

The items of damages which you may consider are as follows: The loss of love and affection which the widow,

the Plaintiff in this case, Wanda Mercer, and now remarried, the loss of love and affection which she suffered as a result of the death of her husband. That is the first item of damages which you consider. You must do your best to put a dollar sign on that loss of love and affection, if you decide in favor of the Plaintiff. If you decide in favor of the Defendant, of course, you do not raise the question of damages at all.

The second item of damage which you will consider if you determine to give a verdict for the Plaintiff, is loss of support. A wife has the right to expect support from her husband. You have heard the amount of money which Byrd Mercer was making at the time of his death. You will [fol. 290] consider that in determining this loss of support on the part of the Plaintiff in this case. You will also consider the fact that the Plaintiff herself was married some year and a half after the death, which, of course, would have a very definite effect on the loss of support factor in this case. You should also consider the funeral bill which has been agreed to in the evidence, and is stipulated as to the amount, and I think that it is in the neighborhood of $700.00. I don't think that there are any other items of damages. Those are the three: Loss of love and affection, loss of support, and the funeral bill.

All twelve of you must agree whichever you find. Your verdict must be unanimous. When you retire you will select your own foreman, and you may circle on the form provided your verdict, as already indicated to you. Your verdict will be dated and signed by the foreman whom you select.

Will Counsel step up to the Bench, please.

(Conference of Court and Counsel outside the hearing of the Jury.)

The Court: You may now retire.

(The Jury retires for deliberation at 12:35 o'clock P.M.)

Do you have any objections to the pictures going in?

Mr. Hughes: No, sir, no objection.

[fol. 291] Mr. Brumfield: No objection.

The Court: If not, will you give the pictures to the Marshal.

Is there any objection to the documentary evidence, the certificate, and all that?

Mr. Hughes: No objection.

Mr. Brumfield: That will be alright.

The Court: By agreement of Counsel, exceptions to the Court's Charge will now be made as before the Jury was retired.

We will take the exceptions by the Plaintiff first.

EXCEPTIONS TO COURT'S CHARGE BY COUNSEL

Mr. Brumfield: In order to protect the record, the Plaintiff will except to the Court's failure to give the special instructions requested by the Plaintiff, and those numbers are shown by the record and I need not repeat them here, and also we would like to except to the special instructions given at the request of the Defendant. We have no objection to your Honor's general charge.

Mr. Hughes: The Defendant objects to that portion of the charge which stated that the testimony had made out a circumstantial case.

[fol. 292] The Court: If that was included in the general charge, it certainly wasn't my intention.

Mr. Hughes: I think you intended to say that it made out a prima facie case.

Mr. Brumfield: I didn't understand it that way.

The Court: When was that? I would like to get the reporter to read it—

Mr. Hughes: I forget what came next, but the next notation I have is that you spoke of this being a circumstantial case, and I had another note, where I wanted to except to the definition, I think, of circumstantial.

Mr. Brumfield: I was under the impression your Honor said that this was a case involving circumstantial evidence.

Mr. Hughes: No, sir, the word was, "that the testimony" had made out a circumstantial case.

The Court: Just state your exception.

[fol. 293] Mr. Hughes: And I object to that statement, together with the statement made immediately following

it, which had to do with a circumstantial case, the proof made.

I also except to the Court's giving Plaintiff special instructions Numbers Two and Three, and the failure to give Defendant's special instructions Numbers Three and Six.

The Court: Very well.

(Whereupon, Court recessed.)

(Short recess.)

(After recess.)

(The Jury returns at 1:00 o'clock P.M.)

The Court: Ladies and Gentlemen, Counsel has called my attention to a part of the charge which may be misleading, and that Court is going to correct that part of the charge.

Mr. Apodaca, will you read that part which Counsel have called to my attention.

(Thereupon, the Court Reporter read as follows:

"The Plaintiff, the widow of Byrd Mercer alleges, of course, that Theriot did kill her husband and that his negligence proximately resulted in his death, that is, Theriot's negligence. The testimony of all of the witnesses for the Plaintiff has made out what we call in law a circumstantial case.—")

[fol. 294] The Court: That is sufficient. The part I want to refer to immediately is the part which says that the testimony of the witnesses for the Plaintiff has made out what we call in law a circumstantial case. What I meant to say was that the witnesses for the Plaintiff and the Plaintiff herself have sought to make out through her evidence, and through their evidence a circumstantial case. The question as to whether or not the case of the Plaintiff has been proved is for the Jury to determine. In other words, I did not mean to indicate at all at this time in the charge, or at anytime in the charge that it was the Court's view that a circumstantial case had been made out by the Plaintiff or had not been made out by the Plaintiff.

It is up to the Jury to determine specifically whether or not the case has been proved as alleged, and as explained to you by the Court in its instructions.

Now, is there any question about that instruction from anybody?

(The Jury answered "No".)

The Court: Does everybody understand?

(The Jury answered "Yes.")

The Court: You may now be retired.

(The Jury retires at 1:08 o'clock P.M.)

[fol. 295] The Court: We will now recess.

(Short recess.)

(After recess.)

(The Jury returns at 1:22 o'clock P.M.)

The Court: Have you arrived at a verdict?
The Foreman: (Elias Rau) We have, your Honor.
The Court: Receive the verdict.

(Verdict handed by the Clerk to the Court.)

The Court: Read the verdict.

VERDICT

The Clerk: Number 6072 Civil Action, Mrs. Wanda Mercer versus Paris Theriot. Verdict: "We, the Jury, find for the Plaintiff in the amount of $25,000. Elias Rau, Foreman. October 18th, 1957."

The Court: Ladies and Gentlemen of the Jury, is that your verdict?

(The Jury answered "Yes, it is".)

The Court: Let the verdict be recorded, and let the Jury be excused with the thanks of the Court, subject to call.

Court stands at recess. (Whereupon, Court recessed.)

[fol. 296] Reporter's Certificate (omitted in printing).

In United States District Court

Motion Under Rule 50 for Judgment in Accordance With Previous Motion for a Directed Verdict, and Alternatively, Under Rule 59 for a New Trial—Filed October 25, 1957

Defendant moves the Court to set aside the verdict, entered in the above entitled action on October 18, 1957, and the judgment thereon, entered on October 28, 1957, and to enter judgment in favor of defendant in accordance with the motion for a directed verdict made by the defendant at the close of all the testimony herein, on the following grounds, to wit:

1. Plaintiff failed to present any evidence to show that the death of the decedent was caused by injuries sustained as the result of being struck by an automobile.

2. Plaintiff failed to present sufficient evidence to support the conclusion that the automobile driven by defendant [fol. 297] struck decedent.

3. Plaintiff failed to present evidence to show that the negligence of defendant resulted in the death of decedent and did not prove any facts upon which such a finding by the jury can be supported.

In the alternative defendant moves the Court to set aside the verdict, and the judgment entered thereon, and grant defendant a new trial on the following grounds to-wit:

1. The Court was in error in instructing the jury that the testimony of all of the witnesses for the plaintiff has made out a circumstantial case.

2. The Court was in error in attempting to correct its improper instruction after the jury had begun its deliberation thereunder.

3. The Court erred in instructing the jury with respect to circumstantial evidence.

4. The Court was in error in its general charge on circumstantial evidence and particularly in stating, before

any qualifications that "circumstantial evidence is good evidence, and when it shows by a preponderance of all of the evidence in the case the truth of the particular fact, then you must accept that fact."

5. The Court was in error in instructing the jury in accordance with plaintiff's requested special instructions Nos. 2 and 3.

[fol. 298] 6. The Court was in error in failing to give defendant's special instructions Nos. 3 and 6.

7. The verdict (or judgment thereon) is contrary to the law and the evidence.

8. Alternatively, the verdict of the jury is excessive and should be reduced to an amount not exceeding $5,000.00.

Robert G. Hughes

IN UNITED STATES DISTRICT COURT

MOTION FOR STAY OF EXECUTION UNDER RULE 62 (b)—
Filed October 28, 1957

Defendant moves the Court for an order staying an execution of, or any proceedings to enforce, the judgment entered in favor of the plaintiff herein on October 28, 1957, pending disposition of defendant's motion for judgment and in the alternative for a new trial on the grounds that a irreparable injury will result to defendant.

Edward T. Diaz, A. J. Fortier, Jr., Robert G. Hughes, Attorney for defendant.

[fol. 299]

IN UNITED STATES DISTRICT COURT

ORDER STAYING EXECUTION OF JUDGMENT
—October 28, 1957

The defendant having moved for a stay of execution of, or any proceedings to enforce, the judgment entered in the

above entitled cause pending the disposition of the motion of said defendant for judgment and, alternatively, for a new trial.

It Is Ordered that execution of, or any proceedings to enforce, said judgment be and the same is hereby stayed until the disposition of said motions: provided that the defendant has filed herein his bond with surety to be approved by the Court on or before November 1st, 1957, in the amount of $27,500.00 condition for the satisfaction of said judgment in full with interest and cost for delay, or for satisfaction of said judgment as it may be modified upon determination of said motion.

New Orleans, Louisiana, October 28th, 1957.

J. Skelly Wright, Judge.

In United States District Court

Judgment—October 29, 1957

The above entitled and numbered cause having been duly tried before Honorable J. Skelly Wright, Judge and a Jury of the District Court of the United States, for the Eastern District of Louisiana, New Orleans Division, and the Jury having duly rendered a verdict in favor of plaintiff and [fol. 300] against the defendant on the 18th day of October, 1957, in the sum of $25,000.00.

It Is Ordered, Adjudged and Decreed that plaintiff, Mrs. Wanda Mercer, do recover of defendant, Paris Theriot, in the full sum of $25,000.00, together with five per cent per annum interest thereon from date of judicial demand until paid, together with all costs.

Thus Done and Signed at New Orleans, Louisiana, on this 29th day of October, 1957.

J. Skelly Wright, Judge

IN UNITED STATES DISTRICT COURT

BOND—Filed and approved—November 7, 1957

Know All Men By These Presents: that we, Paris Theriot, as principal, and Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto Mrs. Wanda M. Heron in the full and just sum of $27,500.00, to be paid to the said Mrs. Wanda M. Herron, her successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Whereas, the Court having ordered a stay of execution of or any proceedings to enforce the judgment rendered herein pending the disposition of the motion of defendant for judgment in accordance with previous motion for a [fol. 301] directed verdict, and alternatively, for a new trial provided that the said Paris Theriot give a bond in the sum of $27,500.00, conditioned for the satisfaction of the judgment in full with interest and costs for delay, if said judgment is finally sustained;

Now, the condition of this obligation is such, that if the said Paris Theriot shall prosecute his motion to effect and shall satisfy the judgment in full together with interest and costs for delay if for any reason said motion is denied, or shall satisfy in full such modification of the judgment and costs and interest as this Court may adjudge and award on determination of such motion, then this obligation to be void; otherwise to remain in full force and effect.

Dated: November 7, 1957.

Paris Theriot, by Robert G. Hughes, Attorney, Paris Theriot.

Hartford Accident and Indemnity Company, by John A., Attorney in fact.

Approved this 7th day of November, 1957.

J. SKELLY WRIGHT, United States District Judge.

In United States District Court

Minute Entry of Hearing on Motion for Defendant for Judgment and Submission—December 18, 1957

Wright, J:

This cause came on this day to be heard on motion of [fol. 302] defendant for judgment in accordance with previous motion for a directed verdict and alternatively for a new trial.

Present: H. Alva Brumfield, Esq., Attorney for Plaintiff.

Robert G. Hughes, Esq., A. J. Fortier, Jr., Esq., Attorney for Defendant.

Argument.

The matter was submitted when the Court took time to consider.

In United States District Court

Minute Entry of Order Denying Motion for Judgment—December 30, 1957

Wright, J:

This cause came on at a former day to be heard on the motion of defendant for judgment in accordance with previous motion for a directed verdict and alternatively for a new trial and was argued by counsel for the respective parties and submitted when the Court took time to consider.

Now, on due consideration there:

It Is Ordered by the Court that the motion for judgment notwithstanding the verdict and the motion for new trial be, and the same are hereby, Denied.

Reasons

No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to.

[fol. 303]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed January 30, 1958

Notice is hereby given that Paris Theriot, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit, from the final judgment entered in this action on October 30, 1957 and from the judgment denying defendant's motion for judgment notwithstanding the verdict and for a new trial, entered on January 6, 1958.

New Orleans, Louisiana, January 30, 1958.

Robert G. Hughes, Edward T. Diaz, A. J. Fortier, Jr., By: Robert G. Hughes, Attorney for appellant.

IN UNITED STATES DISTRICT COURT

SUPERSEDEAS BOND—Filed January 30, 1958 and approved February 5, 1958

Know All Men By These Presents: that we Paris Theriot, as principal, and Hartford Accident and Indemnity Company, as surety, are held and firmly bound unto Mrs. Wanda M. Herron in the full and just sum of $30,000.00, to be paid to the said Mrs. Wanda M. Herron, her successors, executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

[fol. 304] Whereas, on October 25, 1957 in an action pending in the United States District Court for the Eastern District of Louisiana between Mrs. Wanda Mercer (Herron), as plaintiff, and Paris Theriot, as defendant, civil action No. 6072, final judgment was rendered in favor of the said plaintiff, Mrs. Wanda Mercer Herron, and against Paris Theriot, as defendant, for $25000.00, together with legal interest and cost; and the said defendant, Paris

Theriot having filed a Notice of Appeal from such judgment to the United States Court of Appeals for the Fifth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said Paris Theriot shall prosecute his appeal to effect and shall satisfy the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, or shall satisfy in full such modification of the judgment and such costs, interest and damages as the said Court of Appeals may adjudge and award, then this obligation to be void; otherwise to remain in full force and effect.

Signed and sealed this 30th day of January, 1958.

Paris Theriot, By: Robert G. Hughes, Attorney.

Hartford Accident & Indemnity Company, By: John C., Attorney in Fact.

[fol. 305] Approved this 5th day of February, 1958.

J. Skelly Wright, U. S. District Judge.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER FOR STAY OF EXECUTION—
Filed January 30, 1958

On motion of Paris Theriot, defendant above named, and, on suggesting to the Court that mover has filed a Notice of Appeal, to the United States Court of Appeal for the Fifth Circuit, from the final judgment entered in this action on October 25, 1957 and from the judgment denying defendant's motion for judgment notwithstanding the verdict and for a new trial, and, on further suggesting that mover has furnished a supersedeas bond in favor of Mrs. Wanda M. Herron in the full and just sum of $30,000.00 conditioned as required by law, and said bond has been approved by this Court.

It Is Ordered, that said Wanda M. Mercer (Herron) be and hereby is stayed, pending the determination of defendant's appeal, from enforcing or attempting to enforce said judgment by execution or otherwise.

New Orleans, Louisiana, February 4th, 1958.

J. Skelly Wright, United States District Judge.

[fol. 306]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENT OF RECORD ON APPEAL—Filed February 7, 1958

Appellant, Paris Theriot, designates to be contained in the Record on Appeal, the complete record and all the proceedings, evidence and exhibits in this action, including this document.

Robert G. Hughes, Edward T. Diaz, A. J. Fortier, Jr., Attorneys for Appellant, 1702 American Bank Bldg.

IN UNITED STATES DISTRICT COURT

STIPULATION—Filed February 14, 1958

It is stipulated by the parties to this action, through their undersigned attorneys, that all exhibits filed by both parties in the trial Court be transmitted to the United States Circuit Court of Appeal in their original form.

New Orleans, Louisiana, February 12, 1958.

H. Alva Brumfield, Attorney for plaintiff.

Robert G. Hughes, Attorney for defendant.

ORDER—February 14, 1958

The foregoing stipulation considered,

[fol. 307] It Is Ordered that all exhibits filed by both parties in this action be transmitted to the United States Court of Appeals in their original form.

February 14th, 1958.

J. Skelly Wright, United States District Judge.

[fol. 308] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 309]

[File endorsement omitted]

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 17214

PARIS THERIOT, Appellant,

versus

MRS. WANDA MERCER, Appellee.

Supplemental Transcript of Record—Filed May 27, 1958

[fol. 310]

IN UNITED STATES DISTRICT COURT

EXCERPT OF PROCEEDINGS ON VOIR DIRE—Filed May 21, 1958

(The above entitled and numbered matter came up for trial on the 17th day of October, 1957, in the Courtroom, U. S. Post Office Building, New Orleans, Louisiana, The Honorable J. Skelly Wright, District Judge, presiding.)

Appearances:

H. Alva Brumfield, Esq., American Bank Building, Baton Rouge, Louisiana, Attorney for Plaintiff.

Robert G. Hughes, Esq., Edward J. Diaz, Esq., A. J. Fortier, Jr., Esq., American Bank Building, New Orleans, Louisiana, Attorneys for Defendant.

Proceedings

The Court: Is the Jury acceptable to the Defendant?

Mr. Hughes: Yes, Your Honor.

The Court: Is the Jury acceptable to the Plaintiff?

Mr. Brumfield: May it please your Honor, we request the Court to ask these prospective Jurors whether or not they will give due consideration, under your advises and instructions, to circumstantial evidence.

[fol. 311] The Court: This case, to some extent, at least, will depend upon circumstantial evidence. Circumstantial evidence is good evidence. Sometimes circumstantial evidence is more persuasive than direct evidence because behind direct evidence is the credibility of the witnesses who give it, just as behind circumstantial evidence is the credibility of the witnesses who give it. Circumstantial evidence is evidence of facts from which the facts in suit, the facts to be proved, can be inferred. Direct evidence, of course, is evidence of the fact itself. For example, a person who sees a murder and testifies to the murder, is a witness by direct evidence. A person, however, who merely testifies that he saw the Defendant in the area where the murder took place, is testifying to circumstantial evidence. Both circumstantial evidence and direct evidence are admissible, and the Jury will be further instructed on circumstantial evidence as well as direct evidence at the close of this case. But, in the meantime, you are instructed now that circumstantial evidence must be considered along with direct evidence in determining your verdict.

Is there any Juror who feels he or she cannot, because of some predilection understand and use circumstantial evidence as well as direct evidence in coming to a decision or a verdict in this case?

(The Jury answered "No.")

[fol. 312] The Court: Is the Jury acceptable to the Plaintiff?

Mr. Brumfield: The Jury is acceptable.

The Court: Is the Jury acceptable to the Defendant?

Mr. Hughes: Yes.

The Court: Let the Jury be sworn.

(Whereupon, the Jury was duly sworn.)

[fol. 313] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 314]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19068

MRS. WANDA MERCER, Appellant,

versus

PARIS THERIOT, Appellee.

In Forma Pauperis
Transcript of Record—Filed June 27, 1961

[fols. 315-317]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072—Civil Action

MRS. WANDA MERCER, Plaintiff-Appellant,

versus

PARIS THERIOT, Defendant-Appellee.

CAPTION

APPEARANCES:

H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, La., Attorney for Plaintiff-Appellant.

Stanley E. Loeb, 318 Richards Bldg., New Orleans 12, La., Robert Hughes, 1702 American Bank Bldg., New Orleans 12, La., Attorneys for Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana to the United States Court of Appeals, Fifth Circuit, returnable within Forty (40) days from February 8, 1961 at the City of New Orleans, Louisiana. Extension of time Granted by the Honorable U. S. Court of Appeals, Fifth Circuit, the return day up to and including the 18th day of July, 1961.

[fol. 318]

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleans 6, La.

May 17, 1961

Mr. H. Alva Brumfield
Attorney at law
800 Royal Street
New Orleans, La.

Re: MRS. WANDA MERCER VS. PARIS THERIOT. 6072 C. A.

Dear Sir:

This is to advise that Chief Judge Elbert P. Tuttle has this date granted the motion to incorporate record on former appeal (No. 17214) in the record on the present appeal in the referenced cause.

Yours truly,

Edward W. Wadsworth,
Clerk.

CC Clerk, U. S. District Court
New Orleans, La.

Mr. Stanley E. Loeb
Attorney at law
318 Richards Bldg.
New Orleans, La.

[fol. 319]

IN THE UNITED STATES DISTRICT COURT

FOR THE FIFTH CIRCUIT

October Term, 1958

No. 17,214

D. C. Docket No. 6072 Civil

PARIS THERIOT, Appellant,

versus

MRS. WANDA MERCER, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before Hutcheson, Chief Judge, and Cameron and Wisdom, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the District Judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial;

It is further ordered and adjudged that the appellee Mrs. Wanda Mercer, be condemned to pay the costs of

this cause in this Court for which execution may be issued out of the said District Court.

January 23, 1959.

CLAIR R. JAMES

Issued:
Recoverable Costs:
Docketing cause, etc. $25.00

[Seal]

[fol. 320]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072

Civil Action

[Title omitted]

MINUTE ENTRY ORDER OF MAY 27, 1959

Considering the judgment of the Court of Appeals for the Fifth Circuit in this cause,

It Is Ordered that on or before September 1, 1959, plaintiff file in the record in this case, by deposition, affidavit, or otherwise, evidence showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered. Otherwise, judgment for defendant will be entered.

Wright, J.

[fol. 321] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action Number 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed August 8, 1959

To:

Robert G. Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

Please Take Notice that the depositions, upon oral examination, of Paris Theriot, Hubert Louis Prudhomme, Nelson Guidry, Douglas Milliet and William Gautreau, will be taken on behalf of the Complainant herein before F. E. Zimmer, Notary Public, or before some other officer authorized by law to take depositions, on the 26th day of August, 1959 at 2:00 p.m. o'clock, in Room 245, Post Office Building (Judge Wright's Courtroom), New Orleans, Louisiana.

Baton Rouge, Louisiana, August 7, 1959.

H. Alva Brumfield, Attorney for Complainant.

Certificate of service (omitted in printing).

[fol. 322] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action Number 6072

[Title omitted]

MOTION FOR EXTENSION OF TIME—Filed August 8, 1959

Mrs. Wanda Mercer, Complainant, shows that on May 27, 1959 Your Honor entered an order to the effect that on or before September 1, 1959 she file in the record in this case, by deposition, affidavit, or otherwise, evidence showing that on another trial, evidence of sufficient probative force to justify submission of the cause to the jury, be offered, otherwise, judgment for defendant would be entered.

Complainant needs additional time within which to obtain and file evidence and, therefore, moves this Honorable Court to grant an extension of time until November 1, 1959, within which to obtain and file said evidence.

By Attorney:

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 323]

ORDER GRANTING EXTENSION OF TIME, ETC.—August 10, 1959

The above and foregoing action being considered:

It Is Ordered that Complainant, Mrs. Wanda Mercer be granted an extension of time until November 1, 1959, within which to obtain and file additional evidence in this matter.

New Orleans, Louisiana, August 10th, 1959.

J. Skelly Wright, Judge, United States District Court.

[fol. 324] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

DEFENDANT'S OBJECTION TO DEPOSITIONS AND ALTERNATIVE MOTION TO LIMIT UNDER RULE 30(b)—
Filed August 13, 1959

Defendant Paris Theriot moves the Court to set aside the notice served by plaintiff to take the depositions of Paris Theriot, Hubert Louis Prudhomme, Nelson Guidry, Douglas Milliet and William Gautreau on August 26th, 1959 at 2:00 P.M., on the following grounds, to-wit:

1.

On May 24th, 1957, before the trial of this case, plaintiff took a lengthly and voluminous deposition of Paris Theriot, consisting of 76 transcribed pages during the course of which all matters material, relevant and irrelevant to the issues of this case were explored; that additionally Paris Theriot was examined under cross-examination on the trial of the case and plaintiff has fully examined the knowledge of said Paris Theriot on the issues herein, both by deposition and in Court; that further depositions of the said Paris Theriot amount to harassment.

2.

That Hubert Louis Prudhomme, Nelson Guidry, Douglas Milliet and William Gautreau were all witnesses on behalf of plaintiff on the trial of this case, and have testified to all matters within their knowledge, and some mat-
[fol. 325] ters without their knowledge, which testimony is available to the plaintiff; that plaintiff has had ample opportunity to discuss the case with these witnesses and has available their sworn testimony taken in Court.

3.

That no useful purpose will be served by taking depositions on matters which were the subject of prior depositions and testimony; that the only thing plaintiff can accomplish is under the broad rules regarding depositions to question the witnesses on matters not admissable in evidence and subsequently offer said depositions on the trial of the case.

4.

That all of the testimony is available to plaintiff, defendant having delivered to plaintiff a complete transcript of the record of this case subsequent to the date the Order of May 27th, 1959 was entered.

5.

That under the Order of this Court, plaintiff is permitted to furnish affidavits of what he intends to prove, and defendant submits that such affidavits of sufficient probative force to fulfill the requirements of said Order be filed before testimony by deposition of any witnesses be taken.

Alternatively, defendant moves the court to limit the subject matter of any depositions, which the Court may permit plaintiff to take, to those facts which plaintiff, by proper affidavit, shows is intended to be established by such depositions.

Respectfully submitted,

Robert G. Hughes, Attorney for Defendant.

[fol. 326] NOTICE OF MOTION

To:

H. Alva Brumfield, Esquire, 205 American Bank Building, Baton Rouge, Louisiana.

Please take notice that the above and foregoing motion will be brought on for hearing before the United States District Court for the Eastern District of Louisiana, Post Office Building, New Orleans, Louisiana, at 10:00 A.M. on

August 19th, 1959, or as soon thereafter as counsel can be heard.

New Orleans, Louisiana, August 12th, 1959.

Robert G. Hughes, Attorney for Defendant.

[fol. 327]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072 C.A.

[Title omitted]

MINUTE ENTRY ORDER OF AUGUST 19, 1959

It Is Ordered By The Court that this cause, fixed for hearing this day on objection of defendant to depositions and alternative motion to limit under Rule 30b, be and the same is hereby continued to August 26, 1959.

Wright, J.

H Alva Brumfield, Esq.,
Robert G. Hughes, Esq.

[fol. 328]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072 C.A.

[Title omitted]

MINUTE ENTRY ORDER OF AUGUST 26, 1959

The objection of defendant to depositions and alternative motion to limit under Rule 30b was Withdrawn.

Wright, J.

[fol. 329] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action 6072

[Title omitted]

PLAINTIFF'S MOTION FOR ORDER REQUIRING WITNESSES TO ANSWER ETC.—Filed September 24, 1959

To the Honorable the Judges of the United States District Court Within and for the Eastern District of Louisiana, New Orleans Division.

Now into Court, through undersigned counsel, comes Mrs. Wanda Mercer, complainant herein and moves the Court for an order requiring the witnesses, Hubert Louis Prudhomme, Nelson Guidry and Douglas Milliet to answer oral interrogatories propounded to each of them during the course of their examinations upon the taking of their depositions before Ferdinand E. Zimmer, Notary Public, at New Orleans, Louisiana, on August 26, 1959, which interrogatories each of the parties refused to answer as will more fully appear from the depositions of each of the named parties, the depositions having been duly certified by Ferdinand E. Zimmer and are attached hereto and made a part hereof as fully as if written herein in ex tenso.

By Attorney:

H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, Louisiana.

[fol. 330] PROPOSED ORDER

Premises considered:

It Is Ordered that the above and foregoing motion filed on behalf of the complainant for an order requiring witnesses

to answer oral interrogatories be heard at 10:00 o'clock, a.m. Wednesday, September 30, 1959.

New Orleans, Louisiana, September ....., 1959.

.....

Judge

[fol. 331]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE OF MOTION—September 23, 1959

To:

Robert G. Hughes, Esquire, American Bank Building, Baton Rouge, Louisiana.

E. T. Diaz, Esquire, Kenner, Louisiana.

Nelson Guidry, Grand Isle, Louisiana.

Hubert Louis Prudhomme, 3825 Beauvais, Metarie, Louisiana.

Douglas Milliet, 612 Nora Street, Metarie, Louisiana.

Please Take Notice that on the 30th day of September, 1959, at ten o'clock, a.m., or as soon thereafter as counsel can be heard, complainant will move the Honorable J. Skelly Wright, Judge of the United States District Court, Eastern District of Louisiana, New Orleans Division, for an order requiring Hubert Louis Prudhomme, Nelson Guidry and Douglas Milliet to answer the oral interrogatories

as set out in the named parties depositions which each of them refused to answer.

Baton Rouge, Louisiana, September 23, 1959.

By Attorney:

H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, Louisiana.

[fol. 332] Certificate of service (omitted in printing).

[fol. 333]

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—September 30, 1959

To:

Robert G. Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Kenner, Louisiana.

Please Take Notice that the depositions, upon oral examination, of Bennie Verdon, Miss Mercedes Adam and Tpr. Jesse M. Folse, will be taken on behalf of the complainant herein before F. E. Zimmer, Notary Public, or before some other office authorized by law to take depositions, on the 30th day of September, 1959 at 3:00 o'clock, p.m., in Room 245, Post Office Building (Judge Wright's Courtroom), New Orleans, Louisiana.

Baton Rouge, Louisiana, September 30, 1959.

H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, Louisiana.

Certificate of service (omitted in printing).

[fol. 334] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

DEFENDANT'S MOTION TO LIMIT DEPOSITIONS UNDER RULE 30(b)—Filed September 28, 1959

Defendant, Paris Theriot, moves the Court for an order limiting the testimony of Bennie Verdon, Miss Mercedes Adam and Trooper Jesse M. Folse, to new evidence not heretofore developed on the trial of this case, and further moves the Court that plaintiff, through her attorney of record, state on the hearing of this motion or set forth in affidavits prior to the taking of the testimony of the above witnesses, the particular facts sought to be developed by such testimony and, if such facts are proper, that the depositions be limited to those facts and to no other matters.

Respectfully submitted,

Robert G. Hughes, Attorney for Defendant.

NOTICE OF MOTION

To:

H. Alva Brumfield, Esquire, 205 American Bank Building, Baton Rouge, Louisiana.

Please take notice that the above and foregoing motion will be brought on for hearing before the United States District Court, Eastern District of Louisiana, New Orleans Division, Post Office Building, New Orleans, Louisiana, at

10:00 A.M. on Wednesday, September 30th, 1959, or as soon thereafter as counsel can be heard.

New Orleans, Louisiana, September 25th, 1959.

Robert G. Hughes

[fol. 335] Certificate of service (omitted in printing).

[fol. 336]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

OBJECTION BY DEFENDANT TO REQUEST FOR ORDER REQUIRING CERTAIN WITNESSES TO ANSWER ORAL INTERROGATORIES

Defendant objects to the motion filed by plaintiff for an order requiring Hubert Louis Prudhomme, Nelson Guidry and Douglas Milliet to answer certain oral interrogatories, on the grounds that the depositions of said witnesses reveal their knowledge is limited to gossip and hearsay, and the answers to said interrogatories would be of no probative force or effect.

Respectfully submitted,

Robert G. Hughes, Attorney for Defendant.

Certificate of service (omitted in printing).

[fol. 337]

IN UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

No. 6072 CA

[Title omitted]

MINUTE ENTRY—September 30, 1959

This cause came on this day to be heard on

1) motion of plaintiff to require witnesses, Hubert Louis Prudhomme, Nelson Guidry and Douglas Milliet to answer oral interrogatories in depositions;

2) objection of defendant to plaintiff's motion to require certain witnesses to answer oral interrogatories;

3) motion of defendant to limit depositions of Bennie Verdon, Miss Mercedes Adam & Trooper Jesse M. Folse to newly discovered evidence.

Present:

H. Alva Brumfield, Esq., Attorney for Plaintiff.

Robert G. Hughes, Esq., Attorney for Defendant.

It Is Ordered by the Court that witnesses Hubert Louis Prudhomme, Nelson Guidry and Douglas Milliet answer questions propounded to them by counsel for respective parties with reference to the headlight and with person or persons who they understood were parties to a payoff in connection with suppression of the evidence in this case and all other pertinent evidence, even though it might be hearsay, and the means by which this evidence was obtained.

It Is Further Ordered by the Court that the motion of defendant to limit the depositions of Bennie Verdon, Miss Mercedes Adam and Trooper Jesse M. Folse to newly discovered evidence, be and the same is hereby Granted.

Wright, J.

[fol. 338] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed October 5, 1959

To:

Robert G. Hughes, Esquire, American Bank Building, Baton Rouge, Louisiana.

E. T. Diaz, Esquire, Kenner, Louisiana.

NOTICE TO TAKE DEPOSITIONS—filed October 5, 1959

Please Take Notice that the depositions, upon oral examination, of Gilbert Duet, Dr. Charles B. Odom, and Clyde Brantner, will be taken on behalf of the complainant herein before F. E. Zimmer, Notary Public, or before some other officer authorized by law to take depositions, on the 9th day of October, 1959 at 10:00 o'clock, A.M. in the Law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana.

Baton Rouge, Louisiana, October 2, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 339] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed October 14, 1959

To:

Robert G. Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the depositions, upon oral examination, of Nelson Guidry, Hubert Louis Prudhomme, Douglas Milliet and N. A. Plaisance, will be taken on behalf of the complainant herein before F. E. Zimmer, Notary Public, or before some other officer authorized by law to take depositions, on the 16th day of October, 1959, at 10:00 o'clock, A.M. in the Law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana.

Baton Rouge, Louisiana, October 12, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 340] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed October 20, 1959

To:

Robert Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the depositions of Nelson Guidry and Hubert Louis Prudhomme will be taken upon oral examination before F. E. Zimmer, Notary Public, or some other person authorized by law to take depositions, at 10:00 o'clock a.m. in the law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana.

Baton Rouge, Louisiana, October 19, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 341] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed October 22, 1959

To:

Robert Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the depositions of Nelson Guidry and Hubert Louis Prudhomme will be taken upon oral examination before F. E. Zimmer, Notary Public, or some other person authorized by law to take depositions, at 10:00 o'clock, a.m. in the Law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana, on Friday, October 23, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 342] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

PLAINTIFF'S MOTION FOR EXTENSION OF TIME—
Filed October 23, 1959

To the Honorable the Judges of the United States District Court Within and for the Eastern District of Louisiana, New Orleans Division.

Now Into Court, through undersigned counsel, comes Mrs. Wanda Mercer, complainant herein and respectfully moves the Court for an additional thirty days extension of time from November 1, 1959 within which to make a showing in compliance with the decision of the United States Fifth Circuit Court of Appeal in this matter for the reason that the United States Marshal has been unable to serve subpoenas on the witnesses, Hubert Louis Prudhomme and Nelson Guidry, for the taking of their depositions after this Honorable Court ordered these witnesses to answer interrogatories they had previously refused to answer.

Wherefore, mover prays for an additional thirty (30) days extension of time November 1, 1959 within which to file new evidence in this matter in compliance with the order of this Honorable Court.

By Attorney:

H. Alva Brumfield

[fol. 343]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

ORDER ALLOWING EXTENSION OF TIME—October 22, 1959

Premises considered:

It Is Ordered that the plaintiff be granted an extension of time to December 1, 1959 within which to file new evidence in this matter.

New Orleans, Louisiana, October 22nd, 1959.

J. Skelly Wright, Judge.

[fol. 344] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITIONS—Filed October 24, 1959

To:

Robert Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the depositions of Nelson Guidry and Hubert Louis Prudhomme will be taken upon oral examination before F. E. Zimmer, Notary Public, or some other person authorized by law to take depositions, at 10:00

o'clock, a.m. in the Law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana, on Friday, November 13, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 345] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE TO TAKE DEPOSITION—Filed November 17, 1959

To:

Robert Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the depositions of Nolty Theriot will be taken upon oral examination before F. E. Zimmer, Notary Public, or some other person authorized by law to take depositions in the Law Office of H. Alva Brumfield, 800 Royal Street, New Orleans, Louisiana, at ten o'clock, a.m. on Friday, November 20, 1959.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 346] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

PLAINTIFF'S MOTION FOR NEW TRIAL—
Filed November 30, 1959

To the Honorable the Judges of the United States District Court Within and for the Eastern District of Louisiana, New Orleans Division.

Now into Court, comes Mrs. Wanda Mercer and respectfully represents as follows:

1.

That in accordance with your Honor's order under date of May 27, 1959 and the extensions granted, plaintiff was ordered to file in the record in this case by deposition, affidavit or otherwise, evidence showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered.

2.

That plaintiff files herewith the depositions of Hubert Louis Prudhomme, Nelson Guidry, Douglas M. Milliet, taken August 26, 1959, as well as the depositions of these three individuals taken on November 13, 1959 and on October 16, 1959 respectively; the latter depositions were taken after Your Honor ordered these witnesses to reveal the names of [fol. 347] the person they had heard had found the rim of the right front headlight of the Oldsmobile belonging to Paris Theriot and that this headlight rim was found at the scene of the accident.

3.

That plaintiff also files herewith the depositions of Miss T. Mercedes Adam, Benny Verdon and Jesse M. Folse, taken on September 30, 1959.

4.

Plaintiff further files the deposition of William J. Gautreaux taken on Wednesday, August 26, 1959 as well as eight photographs which were taken by Gautreaux at ten o'clock, a.m. on December 9, 1955 numbered 5202-1 through 5202-8.

5.

Plaintiff further files the deposition of Nolty Theriot taken on Friday, November 20, 1959.

6.

Plaintiff further filed herewith the deposition of Paris Theriot taken on August 26, 1959.

7.

Plaintiff also attaches hereto a statement of Ralph Snyder, dated May 16, 1959, to the effect that the Theriot car struck a soft object.

7 (a).

Plaintiff also files herewith the depositions of Gilbert Duet, taken on October 9, 1959, and Nolan Plaisance and Douglas Milliet, taken on October 16, 1959.

[fol. 348] 8.

Plaintiff further shows that she will offer the testimony or deposition of Clyde Brantner, Superintendent who worked with Mercer, who will testify that Mercer left walking down the road the night of his death.

9.

The depositions of the various witnesses and law enforcing officers in many instances pointing their finger at each

other corroborates and strengthens the evidence that was adduced at the trial to the effect that the evidence in this case was destroyed and that the missing headlight rim was found and that there was either a payoff on the case or an attempt to have one.

10.

These additional depositions are further evidence and corroborate the facts already established to the effect Paris Theriot was unquestionably the tort feasor.

Wherefore, plaintiff prays that a new trial be ordered and for all other necessary orders in the premises, full, general and equitable relief.

By Attorney:

H. Alva Brumfield

[fol. 349] Certificate of service (omitted in printing).

[fol. 350] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

MRS. WANDA MERCER,

VS.

PARIS THERIOT.

NOTICE OF MOTION—Filed November 3, 1960

To:

Robert G. Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

E. T. Diaz, Esquire, Golden Meadow, Louisiana.

Please Take Notice that the undersigned will bring the Motion for a New Trial which was filed on November 30, 1959, before the Court at the United States Post Office Building, New Orleans, Louisiana, on the 16th day of November, 1960 at 10:00 o'clock, a.m. or as soon thereafter as counsel can be heard.

By Attorney:

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 351]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
November 16, 1960

This cause came on for hearing this day on motion of Plaintiff for a New Trial.

Present:

H. Alva Brumfield, Esq., Attorney for Plaintiff.

Robert G. Hughes, Esq., Attorney for Defendant.

Argument.

Submitted.

Wright, J.

[fol. 352]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

MINUTE ENTRY—December 12, 1960

This case came on for hearing on a former day on motion of plaintiff for a new trial. The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

It Is Ordered that the motion of plaintiff for a new trial be, and the same is hereby, Denied.

Reasons

This court has carefully studied the additional evidence submitted in support of the motion for new trial. This evidence, while persuasive, would be inadmissible in a new trial under the hearsay rule.

Wright, J.

[fol. 353] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

PLAINTIFF'S MOTION FOR REHEARING ON MOTION FOR NEW TRIAL—Filed December 22, 1960

To the Honorable the Judges of the United States District Court Within and for the Eastern District of Louisiana, State of Louisiana:

Complainant, Mrs. Wanda Mercer, moves this Honorable Court for a rehearing of plaintiff's motion for a new trial which was denied by this Court on December 12, 1960.

By Attorney:

H. Alva Brumfield

[fol. 354]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE OF MOTION

To:

Robert Hughes, Esquire, American Bank Building, New Orleans, Louisiana.

Please Take Notice that the undersigned will bring the attached motion for rehearing of the plaintiff's motion for a new trial on for hearing before the Court at the United

States Post Office Building, New Orleans, Louisiana, on the 4th day of January, 1961, at ten o'clock, a.m. or as soon thereafter as counsel can be heard.

Baton Rouge, Louisiana, December 21, 1960.

H. Alva Brumfield

Certificate of service (omitted in printing).

[fol. 355] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

DEFENDANT'S MOTION TO SUBSTITUTE COUNSEL—
Filed December 23, 1960

On motion of Paris Theriot, and upon suggesting to the Court that his attorney of record, Robert G. Hughes, is no longer engaged in the practice of law and mover desires to substitute Stanley E. Loeb, Esq., as attorney for mover;

The foregoing considered:

ORDER

It Is Ordered that Stanley E. Loeb, Esq., be, and he is hereby entered as attorney of record for Paris Theriot in place of Robert G. Hughes.

December 28th, 1960.

J. Skelly Wright, U. S. District Judge.

Robert G. Hughes

[fol. 356]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072

Civil Action

[Title omitted]

MINUTE ENTRY ON HEARING ON MOTION FOR REHEARING AND SUBMISSION—January 4, 1961

This cause came on for hearing this day on motion of Plaintiff for rehearing of Plaintiff's motion for a new trial previously denied on December 12, 1960.

Present:

H. Alva Brumfield, Esq., Attorney for Plaintiff.

Stanley E. Loeb, Esq., Attorney for Defendant.

Argument.

Submitted.

Wright, J.

[fol. 357]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

No. 6072—Civil Action

MRS. WANDA MERCER

versus

PARIS THERIOT

MINUTE ENTRY DENYING REHEARING ETC.—January 20, 1961

This cause came on at a former day for hearing on the motion of plaintiff for a re-hearing of plaintiff's motion

for a new trial, previously denied herein, and was argued by counsel for the parties at interest and submitted, when the Court took time to consider.

Whereupon, and upon due consideration thereof;

It Is Ordered by the Court that the motion of plaintiff for a re-hearing of plaintiff's motion for a new trial, be, and the same is hereby, Denied.

Judge Wright

H. Alva Brumfield
Stanley E. Loeb

[fol. 358] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

NOTICE OF APPEAL—filed February 8, 1960

Notice Is Hereby Given that complainant, Mrs. Wanda Mercer, hereby appeals to the United States Court of Appeals, for the Fifth Circuit from the final judgment entered in this action on January 20, 1961.

By Attorney:

H. Alva Brumfield

[fol. 359] Cost Bond on appeal for $250 filed February 8, 1960 (omitted in printing).

[fol. 361] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

DESIGNATION OF CONTENTS OF RECORD—
Filed February 8, 1960

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the Complainant-appellant hereby designates for inclusion of the record on appeal to the United States Court of Appeals for the Fifth Circuit taken by Notice of Appeal filed February ....., 1961, the complete record of all proceedings and evidence in this action, including without limitation, the following:

1. All pleadings filed by or on behalf of complainant and defendant;
2. The complete transcript of proceedings during the trial, including all testimony and exhibits, depositions and all remarks, statements or comments by any counsel or by the Court;
3. All special charges;
4. All opinions, judgments, orders, rulings and minute entries by the Court;
5. Notice of Appeal and Bond;
6. His Designation of Record;
7. Clerk's Certificate.

By Attorney:

H. Alva Brumfield, 205 American Bank Bldg., Baton Rouge, Louisiana.

Certificate of service (omitted in printing).

[fol. 362]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action Number 6072

MRS. WANDA MERCER,

versus

PARIS THERIOT.

EXCERPT OF HEARING ON MOTION OF PLAINTIFF FOR REHEARING OF PLAINTIFF'S MOTION FOR NEW TRIAL PREVIOUSLY DENIED ON 12/12/60

Appearances:

H. Alva Brumfield, Esq., 205 American Bank Bldg., Baton Rouge, Louisiana, Attorney for Plaintiff.

Stanley E. Loeb, Esq., Loeb & Livaudais, Richards Building, New Orleans, Louisiana, Attorney for Defendant.

(The above entitled and numbered matter came up for hearing on this, the 4th day of January, 1961, in the Courtroom, United States Post Office Building, New Orleans, Louisiana; The Honorable J. Skelly Wright, District Judge, presiding.)

[fol. 363] Proceedings

The Court: We will now take up the matter in Civil Action 6072.

(Argument by Mr. Brumfield.)

The Court: There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man. But, I will hear from the other side.

(Argument by Mr. Loeb.)

The Court: I will have another look at this matter but my impression is, as stated on the ruling for application for a new trial, that the Fifth Circuit ruled that there was not sufficient evidence to support the verdict. And that unless the Plaintiff was able to, on his own motion for a new trial, to advance additional evidence which would be substantial in nature and which would make out a case for the Jury, the verdict for the Defendant should be granted. And after reviewing the new evidence which the Plaintiff provided, I felt that while the evidence was persuasive and it showed skulduggery in this case, that the sheriff's locker had been rifled and the evidence which was taken from Paris Theriot's car was destroyed so it couldn't be produced in his criminal case or civil case involving this death, there was still no direct evidence. There was just talk among the deputies who were concerned with obtaining [fol. 364] the evidence and who, unfortunately, were unable to get the evidence when they went to the locker to get it in order to bring it to the laboratory to have it examined. I felt that the evidence, as produced under the application for a new trial, was not competent evidence. In other words, it would have violated the hearsay rule if admitted, and that is the basis on which I denied the application for a new trial.

It is my view the Fifth Circuit did say that as tried originally there was not sufficient evidence. There is no doubt that it said that unless additional, substantial evidence was presented on application for a new trial, the verdict should be for the Defendant. That was the basis of my ruling, but I am willing to have another look at it because of the feelings that you have presented in this case. I do believe that I am going to be required to reaffirm the ruling that I previously made. I will mark the matter submitted.

Court stands at recess.

(Whereupon, Court recessed.)

[fol. 365] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 366] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

MRS. WANDA MERCER

VS.

PARIS THERIOT

MOTION OF PLAINTIFF TO APPEAL IN FORMA PAUPERIS—
Filed April 11, 1960

Now Into Court comes Wanda Mercer, appearing herein through undersigned counsel, and moves the Court for an order allowing her to proceed in the above entitled case in forma pauperis and to prosecute her appeal therein to the United States Court of Appeal, Fifth Circuit, without being required to pay for the cost of printing of the record on appeal and that if a printing of the record is necessary same be paid for by the United States.

Mover further shows that this case has previously been appealed to the United States Court of Appeal for the Fifth Circuit and the record has been printed and that the only additional record that would be necessary to be lodged on this appeal is various depositions, written report and the comments and rulings of the United States District Judge and that as the United States Court of Appeals, Fifth Circuit, provides by rule for the hearing of appeals on the original papers the original of these depositions, reports and ruling and opinions of the Trial Judge would suffice.

Mover, therefore, prays that her appeal be allowed without the payment of the costs of the printing of the record if that is necessary and in the alternative that it be allowed on the original papers.

By Attorney:

H. Alva Brumfield

[fol. 367]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

MRS. WANDA MERCER

VS.

PARIS THERIOT

NOTICE OF HEARING

To:

Stanley E. Loeb, Esquire, Richards Building, New Orleans, Louisiana.

Notice Is Hereby Given that the attached motion will come on for hearing before this Court on Wednesday, May 3rd, 1961, at ten o'clock, a.m. or as soon thereafter as counsel may be heard.

By Attorney:

H. Alva Brumfield

[fol. 368]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

MINUTE ENTRY OF ORDER GRANTING PLAINTIFF'S MOTION TO APPEAL IN FORMA PAUPERIS—May 3, 1961

This cause came on for hearing this day on motion of Plaintiff for Forma Pauperis.

Present:

There being no objection, It Is Ordered that the motion of Plaintiff for Forma Pauperis be, and the same is hereby, Granted.

H. Alva Brumfield, Esq.,
Stanley E. Loeb, Esq.

Wright, J.

[fol. 369] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

PLAINTIFF'S MOTION FOR TRANSMITTAL OF DEPOSITIONS AND STATEMENT IN THEIR ORIGINAL FORM—Filed May 17, 1960

On Motion of Mrs. Wanda Mercer through H. Alva Brumfield, Attorney of Record, and on suggesting to the Court that Notice of Appeal has heretofore been filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, from an adverse judgment rendered in the captioned matter on February 8, 1961; and,

On Further Suggesting to the Court that plaintiff's Supplemental and Amended Designation includes the various depositions filed by plaintiff in the above captioned matter subsequent to the entering of the mandate of the United States Court of Appeals for the Fifth Circuit, filed in the District Court May 12, 1959; and,

On Further Suggesting to the Court that in order to save needless reduplication of these depositions by the Clerk of the District Court and in the interest of saving needless

expense, these various depositions should be transmitted to the United States Court of Appeals for the Fifth Circuit in their original form;

On Further Suggesting to the Court that these various depositions and statement are the following:

Gilbert Duet, taken October 9, 1959

Nolan Plaisance and Douglas Milliet, taken October 16, 1959

Douglas Milliet, taken August 26, 1959

[fol. 370] Paris Theriot, taken August 26, 1959

Nolty Theriot, taken November 20, 1959

William Joseph Gautreau, Jr., taken August 26, 1959

Nelson Guidry, taken August 26, 1959

Nelson Guidry, taken November 13, 1959

Hubert Louis Prudhomme, taken August 26, 1959

Hubert Louis Prudhomme, taken November 13, 1959

Miss T. Mercedes Adam, taken September 30, 1959

Statement signed by Ralph H. Snyder, dated May 16, 1959.

ORDER—May 18, 1961

It Is Ordered, Adjudged, And Decreed that the above and foregoing Motion for Transmittal of Depositions and Statement in Their Original Form be considered, and that the above said depositions and statement be transmitted in their original form in the record on appeal in the United States Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, this 18th day of May, 1961.

J. Skelly Wright, Judge.

Respectfully submitted:

H. Alva Brumfield, Attorney for Mrs. Wanda Mercer, Plaintiff, 800 Royal St., New Orleans, Louisiana.

Certificate of service (omitted in printing).

[fol. 371] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

SUPPLEMENTAL AND AMENDED DESIGNATION OF CONTENTS OF RECORD—Filed May 19, 1960

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the complainant-appellant hereby submits a Supplemental and Amended Designation of Contents of Record for inclusion of the record on appeal of the United States Court of Appeal for the Fifth Circuit taken by Notice of Appeal filed February 8, 1961.

1. Comments and rulings of the United States District Judge as well as all pleadings of defendant and plaintiff filed subsequent to the entering of the mandate of the Fifth Circuit Court of Appeals filed in the United States District Court May 12, 1959.

2. Various depositions taken subsequent to the mandate of the United States Court of Appeals for the Fifth Circuit dated May 12, 1959, as follows:

Gilbert Duet, taken October 9, 1959

Nolan Plaisance and Douglas Milliet, taken October 16, 1959

Douglas Milliet, taken August 26, 1959

Paris Theriot, taken August 26, 1959

Nolty Theriot, taken November 20, 1959

[fol. 372] William Joseph Gautreau, Jr., taken August 26, 1959

Nelson Guidry, taken August 26, 1959

Nelson Guidry, taken November 13, 1959

Hubert Louis Prudhomme, taken August 26, 1959

Hubert Louis Prudhomme, taken November 13, 1959

Miss T. Mercedes Adam, taken September 30, 1959

3. The statement signed by Ralph H. Snyder, dated May 16, 1959.

4. Motion of Plaintiff for Rehearing of Plaintiff's Motion for New Trial previously denied on 12/12/60, Excerpt, filed in the District Court April 10, 1961;

5. Motion for Forma Pauperis filed by Plaintiff April 11, 1961;

6. Minute Entry dated May 3, 1961, granting plaintiff's motion for forma pauperis;

7. This Supplemental and Amended Designation of Contents of the Record;

8. Clerk's Certificate.

H. Alva Brumfield, Attorney for Mrs. Wanda Mercer, 800 Royal St., New Orleans, Louisiana.

Certificate of service (omitted in printing).

[fol. 373] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEW ORLEANS DIVISION

Civil Action No. 6072

[Title omitted]

PLAINTIFF'S MOTION TO TRANSMIT IN ORIGINAL FORM—Filed May 24, 1960

On Motion of Mrs. Wanda Mercer through H. Alva Brumfield, Attorney of Record, and on suggesting to the

Court that Notice of Appeal has heretofore been filed in the United States District Court for the Eastern District of Louisiana, New Orleans Division, from an adverse judgment rendered in the captioned matter on February 8, 1961; and,

On Further Suggesting to the Court that plaintiff's Supplemental and Amended Designation includes all exhibits, depositions, as well as all pleadings filed by defendant and plaintiff subsequent to the entering of the mandate of the United States Court of Appeal for the Fifth Circuit filed in the United States District Court May 12, 1959; and,

On Further Suggesting to the Court that included in such designation is a thermofax copy of an excerpt on Motion of Defendant for Judgment in Accordance with Previous Motion for a Directed Verdict, and Alternatively for a New Trial which cannot be reproduced by the Clerk of the United States District Court; and,

On Further Suggesting to the Court that the record contains certain exhibits, all of which plaintiff requests be transmitted in their original form; and,

On Further Suggesting to the Court that in order to [fol. 374] save needless reduplication by the Clerk of the District Court and in the interest of saving needless expense, the following deposition should be transmitted to the United States Court of Appeals for the Fifth Circuit in its original form:

Douglas Milliet, taken August 26, 1959

It Is Ordered, Adjudged, And Decreed that the above and foregoing Motion to Transmit in Original Form be considered and that the above said thermofax copy of excerpt on Motion of Defendant for Judgment in Accordance with Previous Motion for a Directed Verdict, and Alternatively for a New Trial, all exhibits, and the above mentioned deposition of Douglas Milliet, taken August 26, 1959, be transmitted in their original form in the record on appeal in the United States Court of Appeals for the Fifth Circuit.

New Orleans, Louisiana, this 24th day of May, 1961.

J. Skelly Wright, Judge.

Respectfully submitted:

H. Alva Brumfield, Attorney for Mrs. Wanda Mercer, Plaintiff, 800 Royal Street, New Orleans, Louisiana.

Certificate of service (omitted in printing).

[fol. 375]

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

Post Office Box 23
New Orleans 6, La.

June 17, 1961

Clerk
U. S. District Court
New Orleans, Louisiana

Re: Mrs. Wanda Mercer vs. Paris Theriot. 6072 CA

Dear Sir:

This is to advise that the Court has today entered an order extending the time for a period of thirty (30) days from June 18, within which to file the record on appeal in the referenced cause in this Court.

Very truly yours,

Edward W. Wadsworth, Clerk

Gilbert F. Ganuchean, Deputy Clerk

GFG/bw
cc: Mr. H. Alva Brumfield
Mr. Stanley E. Loeb

[fol. 376] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 377] Minute Entry of Argument and Submission—January 29, 1962 (omitted in printing).

[fol. 378]

LETTER OF CLERK TO COUNSEL ADVISING OF EN BANC SUBMISSION

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

POST OFFICE BOX 23
NEW ORLEANS 6, LA.

March 2, 1962

Mr. H. Alva Brumfield
Attorney at Law
Baton Rouge, Louisiana

Mr. Stanley E. Loeb
Attorney at Law
New Orleans, Louisiana

Re: No. 19068—Mrs. Wanda Mercer vs.
Paris Theriot

Gentlemen:

Pursuant to Rule 25a of this Court, the Court on its own motion has ordered that this cause be heard before the full Court en banc on May 8, 1962. It will be heard and considered without oral argument on the record and briefs of the first appeal and the instant appeal challenging the orders of the District Court entered after remand to it. If the parties desire, they may file additional briefs and

reply briefs. In such case, the supplemental brief of appellants shall be filed not later than March 27th, 1962, and the reply of appellees by April 24th, 1962.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By .....
Chief Deputy Clerk

[fol. 379]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19068

[Title omitted]

MINUTE ENTRY OF EN BANC SUBMISSION—May 8, 1962

On this day this cause was submitted to the Court en banc on the record and briefs on file, without oral argument.

[fol. 380]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19068

MRS. WANDA MERCER, Appellant,

versus

PARIS THERIOT, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before Tuttle, Chief Judge, Hutcheson, Rives, Cameron, Jones, Brown, Wisdom, Gewin, and Bell, En Banc.

OPINION—March 14, 1963

Wisdom, Circuit Judge: In the early hours of the morning of December 19, 1955, Willie B. Mercer's body was found face down on the side of Highway 1 on Grand Isle, Louisiana. The coroner's certificate shows that he died about 7:30 p. m. December 18. Tire marks leading to the [fol. 381] body indicated that Mercer was run over while he was on the shoulder of the road. Around 7:30 p. m. on December 18 Paris Theriot, the defendant, had left Fisherman's Bar on Grand Isle, taking Highway 1 to return to his home in Golden Meadow. The chronology and the fact that he had been drinking in Fisherman's Bar since one o'clock pointed to Theriot. In addition, the investigating officers recalled that Theriot had run over and killed a pedestrian in each of two accidents twenty or twenty-five years ago. The police investigation disclosed that the right front fender of Theriot's automobile was dented and the rim of the right headlight missing. There was also a large dent on the hood of the car. Theriot gave two different explanations for the damage to his car: he said that he had run into a cow and he said that a four by six piece of lumber had dented the hood when he ran into a lumber truck. A deputy sheriff found a blue mark on the hood; Mercer had been wearing blue denim overalls. Another deputy found "hair-like substances" underneath the car, a towel bearing reddish stains, and a white powdery substance on the car that appeared to be soap powder from a recent car-washing. The officer took scrapings of the blue spot, the hair-like substances, and the white powder and placed these in envelopes. The envelopes, the towel, and certain other articles were brought to the office of the Sheriff of Jefferson Parish and placed in the "evidence locker." This evidence disappeared before the trial and before any of it could be analyzed.

The decedent's wife brought a wrongful death action against Theriot resulting in a jury verdict in her favor for $25,000. On appeal, this Court, Judge Hutcheson presiding and writing the opinion for the Court, unanimously decided [fol. 382] that the judgment should be reversed with directions to enter a verdict for the defendant. *Theriot* v. *Mercer*, 5 Cir., 1959, 262 F. 2d 754; certiorari denied, 360 U. S.

914 (1959). The Court pointed out that highly prejudicial testimony, which should not have been admitted, and inflammatory trial tactics of the plaintiff's attorney had the effect of denying the defendant a fair trial.[1] The Court rested its decision on insufficiency of the evidence to support the verdict: there was a "complete absence of any evidence, circumstantial or otherwise, that Theriot's car struck the deceased or that Theriot was in anywise negligent". 262 F. 2d at 759. Nevertheless, the Court felt that the plaintiff should be given an opportunity to better her presentation of the case by producing additional evidence —if she could—to justify a new trial. The mandate therefore directed the district court

> "... to enter a judgment for the defendant unless plain-[fol. 383] tiff, within a time and under condition to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot* v. *Mercer*, 262 F. 2d 754, 761.

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[1] "In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominating the trial, deprived the defendant of his day in court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption." (262 F. 2d 754, 758)

"We, therefore, agree with the appellee's statement on page 6 of her brief that, although the defendant denied making a pay-off or giving any political contribution to the sheriff in the sheriff's race that was going on at that time (and nobody gave testimony to the contrary), the jury nevertheless convicted Theriot of making such a pay-off. Indeed it was the admission of *this wholly inadmissible and highly prejudicial hearsay testimony*, the introduction of which should have caused a mistrial, which changed the cause from a suit for damages into an inquisition into fraud and wrong doing in the sheriff's office, a matter which, in the state of the evidence, had nothing to do with the case and could have had no effect on it except the unlawful one of depriving the defendant of a fair trial on the charge of negligence made but not proven." (262 F. 2d at 757)

In accordance with the mandate, the trial court notified the plaintiff that judgment would be entered for the defendant unless she tendered sufficient evidence to justify submission of the cause to the jury. The plaintiff then filed a "motion for a new trial" and submitted as supporting evidence a report and certain depositions from police officers. The report was a statement from a safety engineer and accident analyst that, in his opinion, the photographs and medical reports demonstrated that the damage to Theriot's car was caused by its impact with Mercer. The depositions showed some skulduggery in the sheriff's office with regard to the missing evidence and indicated also that some of the officers had heard that Theriot had purchased the missing headlight rim from someone who had found it at the scene of the accident. The district court denied the motion for a new trial. "The evidence", a minute entry states," while persuasive, would be inadmissible in a new trial." Leaning over backwards to be fair, the Court granted a rehearing. On rehearing, the district judge stated from the bench that there was no question in his mind "that there was a denial of justice in this case" and no question in his "mind either that Paris Theriot killed this man", but he felt compelled to deny the motion on the ground that the evidence tendered was not competent, and that the plaintiff had not met the conditions for a new [fol. 384] trial required by the mandate.[2] The plaintiff now appeals from this denial of the motion for a new trial.

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[2] The district court stated:

"[T]he Fifth Circuit ruled that there was not sufficient evidence to support the verdict. And that unless the Plaintiff was able to, on his motion for a new trial, to advance additional evidence which would make out a case for the Jury, the verdict for the Defendant should be granted. And after reviewing the new evidence which the Plaintiff provided, I felt that while the evidence was persuasive and it showed skulduggery in this case, that the sheriff's locker had been rifled and the evidence which was taken from Paris Theriot's car was destroyed so it couldn't be produced in his criminal case or civil case involving this death, there was still no direct evidence. There was just talk among the deputies who were concerned with obtaining the evidence and who, unfortunately, were unable to get the evidence when they went to the locker to get it in order

On this second appeal the panel to which the case was assigned on its own motion invoked a hearing en banc. The Court en banc affirms the action below and dismisses the appeal.

I.

If the order now appealed from had indeed been an order denying a "motion for a new trial", as the plaintiff termed it, the order would be unappealable. *Soble* v. *Diatz*, D. C. Cir., 1951, 189 F. 2d 26; *Bass* v. *B. & O. Terminal Co.*, 7 Cir., 1944, 142 F. 2d 779, cert. den'd 323 U. S. 775. But the motion is not the motion for a new trial contemplated in Fed. [fol. 385] R. Civ. P. 59. Such a motion "serve[s] the function of allowing a party to seek to have the trial court correct errors, both of fact and law, that [occur] in the trial of the action." 6 Moore's Federal Practice 59.03 (1961). An order for a new trial reopens the issues of an action for a new trial on the merits, in whole or in part, *before* an appeal on the merits. Here, however, the plaintiff's motion served a different function. It was filed in direct response to the invitation in this Court's mandate that the plaintiff present new evidence. If the plaintiff had made "a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury [would] be offered," the plaintiff would have been entitled to a "judgment for a new trial." Denial of the motion was a final decision by the district court that the plaintiff had failed to meet the terms of the mandate. The Court therefore holds that in the circumstances of this case the denial of the motion was an appealable order.

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to bring it to the laboratory to have it examined. I felt that the evidence, as produced under the application for new trial, was not competent evidence. In other words, it would have violated the hearsay rule if admitted, and that is the basis on which I denied the application for a new trial.

"It is my view the Fifth Circuit did say that as tried originally there was not sufficient evidence. There is no doubt that it said that unless additional substantial evidence was presented on application for new trial, the verdict should be for the Defendant. That was the basis of my ruling."

II.

The argument is made that since the district court entered judgment in compliance with the mandate on the former appeal, the judgment is not appealable. The contention is, that when judgment is entered after a new trial there is no question of jurisdiction to entertain a subsequent appeal; but when there has been no new trial, as in this case, the judgment entered is that of the appellate court itself and there is simply nothing from which to appeal. This rule has been consistently followed in this circuit. See *Davis* v. *United States*, 5 Cir., 1957, 244 F. 2d 309; *Amalgamated Assn. etc.* v. *Southern Bus Lines, Inc.*, [fol. 386] 5 Cir., 1953, 201 F. 2d 53; *Seagraves* v. *Wallace*, —, —, — F. 2d —, at 163.

But the appellant is not appealing from a decree that is in effect the decree of the court issuing the mandate. The mandate left open the question of the sufficiency of the additional evidence to support a new trial; the order therefore adjudicated a subsequent issue not determined by the judgment which was the basis for the mandate. The appellant contends that the district court both misconstrued the mandate and was guilty of an abuse of judicial discretion in deciding the issue created by the mandate. An appeal lies, therefore, to review the action of the district court to determine whether it gave effect to the mandate. *In re Sandford Fork & Tool Co.*; 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; *Metcalf* v. *City of Watertown*, 1895, 68 Fed. 859; *Mercoid Corp.* v. *Minneapolis-Honeywell Regulator Co.*, 1944, 142 F. 2d 549, *cert. den'd* 320 U. S. 661, 64 S. Ct. 268, 88 L. Ed. 376.

III.

The second appeal does not require a reconsideration of the merits. The narrow questions before the Court en banc are whether the district court properly construed the mandate and whether the district court abused its discretion in holding that the plaintiff failed to meet the terms of the mandate, that is, failed to make a satisfactory showing that the *additional* evidence would justify submission of the case to the jury. Accordingly, it is unnecessary to

consider the application of the "law of the case doctrine". See *Lincoln National Life Insurance Company* v. *Roosth*, 5 Cir., 1962, — F. — 2d.

[fol. 387] A. This Court directed that a new trial be granted upon plaintiff's showing evidence of "sufficient probative force to justify submission of the cause to the jury." Instead, the appellant argues, the district judge adopted a different, more stringent requirement. He required that the evidence be "additional" and "direct".

We hold that the district judge properly construed the mandate. The mandate is meaningless unless it refers to "additional" evidence, for the former opinion holds that the evidence in the record was insufficient to support a verdict and judgment for the plaintiff. It is true that the district judge referred to the lack of new "direct" evidence but the basis for his holding was that the evidence offered was hearsay and incompetent, not that it was indirect and circumstantial.

The appellant argues also that a reading of the Court's first opinion shows the chief ground for reversal to have been counsel's inflammatory trial tactics. To overcome this, counsel argues, it is necessary only to have a new trial which, he assures us, can be had in an atmosphere free from all overtones of passion and prejudice. This proposed solution oversimplifies the problem. In its original opinion the Court severely condemned the trial tactics of the plaintiff's counsel and disapproved of the trial judge's admitting certain testimony that was irrelevant and prejudicial, but the court squarely held that the evidence was insufficient to support the verdict. The mandate looked to new probative evidence sufficient to justify a new trial, not to a new trial on counsel's promise to avoid improper tactics; otherwise, the Court would simply have remanded the case for trial.

[fol. 388] B. Coming now to the sufficiency of the additional evidence to justify a new trial, we find ourselves in agreement with the district judge.

In support of his motion for a new trial the defendant offered ten depositions, seven from witnesses who had testified at the trial. Most of this "evidence" related to the missing headlight rim. The depositions show that up and

down the bayou there were people who knew people who knew that there was a going price for the missing headlight rim. There were conflicting rumors that Prudhomme had the rim, or Verdon had the rim, or Guidry had the rim, or Nolte Theriot had the rim, and that the defendant had purchased it. But Prudhomme testified that he did not have the rim; someone had told him that Guidry had it and was holding it for $10,000. Guidry said he had heard that Theriot's son had the rim. Verdon denied having found the rim and denied that anybody told him that anyone had found the rim. Nolte Theriot said that he had had nothing to do with the rim. Gilbert Duet testified that a deputy sheriff "just passing through" had told him that he had heard that the rim had been found but he did not say who had found it. The depositions contain testimony of no higher degree of reliability relating to a "report" of a pay-off, presumably by Theriot, to some person (unknown) who destroyed the evidence in the Sheriff's "evidence locker". In short, the additional evidence was hearsay of the rankest sort. It lacked probative force because it was incompetent, not because it was indirect or circumstantial evidence.

The accident analyst's report adds little support to the plaintiff's cause. It is of doubtful admissibility because it [fol. 389] comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative.

The district judge correctly interpreted the mandate and correctly ruled that the additional evidence was of insufficient probative value to justify a new trial. The judgment is

Affirmed.

RIVES, *Circuit Judge*, Dissenting:

In my opinion, the most practical and effective safeguard of liberty and justice is the right of trial by jury. In the words of Patrick Henry, "Trial by jury is the best appendage of freedom."[1] I recognize that there are many

[1] 3 Elliotts Debates 324.

eminent lawyers and judges who do not share that view, and that the right of trial by jury is subjected daily to every form of attack, direct and indirect. Such persistent and constant warfare makes it all the more necessary for the defenders of that right to bear in mind that, "Eternal vigilance is the price of liberty."

Whatever may be our differences of opinion as to the intrinsic merits or demerits of trial by jury, there can be no dissent from the proposition that we are each and all bound by the plain language of the Seventh Amendment, and that language bears repeating:

> [fol. 390] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

With the utmost respect for and deference to the views of my brother judges, it is my duty to express my own considered judgment that this Court's decision both on the original appeal[2] and on this appeal is in direct contravention of the mandate of the Seventh Amendment.

A thorough reading and study of the evidence on the original trial leave me with a clear understanding and approval of the jury's verdict for the plaintiff. I can well appreciate the remark of the learned and experienced trial judge, Honorable J. Skelly Wright, made when he denied the defendant's motion for judgment notwithstanding the verdict: "No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to."

This Court's opinion to the contrary on first appeal did not convince Judge Wright, for in denying the plaintiff's later filed motion for new trial,[3] he said: "There isn't any

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[2] Theriot v. Mercer, 5 Cir., 1959, 262 F. 2d 754.

[3] Though immaterial for present purposes, I do not agree with the majority statement that, "If the order now appealed from had indeed been an order denying a 'motion for a new trial,' as the

question in my mind that there was a denial of justice [fol. 391] in this case. There isn't any question in my mind either that Paris Theriot killed this man."

We deal here with a sorry mess where the evidence which might have established the defendant's guilt or innocence with certainty has been destroyed or irretrievably lost as the result of criminal misconduct on the part of someone. The remaining circumstantial evidence might not sustain a criminal prosecution and conviction of the defendant, but it is, I submit, amply sufficient to support a jury's verdict for the plaintiff in a civil action for damages.

The issues presented to the jury on the first trial, and found in favor of the plaintiff, were thus stated in the Court's charge.

> "The issue here is very simple: Did the Defendant, Paris Theriot, kill Byrd Mercer? And, if so, was he guilty of negligence in so doing, which proximately caused that death? That is the sole issue here, whether the Defendant killed Mercer, and if he did, was the death a result of negligence proximately caused by the Defendant Paris Theriot." (R. 1, p. 282.)[4]

In judging the sufficiency of the evidence to justify or support a verdict for the plaintiff, those issues can be narrowed to one; that is, was there substantial evidence from which the jury could reasonably conclude that the defendant, Paris Theriot, killed Byrd Mercer. That is true [fol. 392] because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. *Vick* v. *United States*, 5 Cir., 1954, 216 F. 2d 228, 233; see *Wong Sun and James Wah Toy* v. *United States*,

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plaintiff termed it, the order would be unappealable." As one of the decisions to the contrary, I note that we reversed an order denying a motion for new trial in Whiteman v. Pitrie, 5 Cir., 1955, 220 F. 2d 914.

[4] I refer to the record on first trial as R. 1.

U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: "Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver." 61 C.J.S. p. 212, Motor Vehicles, §511 (4).

That the jury could reasonably conclude that a preponderance of the evidence proved that the defendant Paris Theriot killed Byrd Mercer is shown, I submit, by the following catalogue of the evidence. According to the death certificate Byrd Mercer died on Sunday evening, December 18, 1955 at 7:30 p. m. (R. 1, p. 28). His body was found on the island, Grand Isle, on the right side of the road going toward the bridge leading to the mainland (R. 1, p. 37). The body was two to three feet off the edge of the black top (R. 1, p. 45). Tire marks near his body ran off the road for quite a way, and his body was right next to the tire marks (R. 1, p. 85). An autopsy revealed evidences of a violent blow. "'Fractured dislocation of atlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of skull; rupture of spleen, liver, and both renal arteries; lacerations of scalp, face, right thigh, right hand and left leg.'" (R. 1, pp. 28, 29.) [fol. 393] The road was the only highway leading from Grand Isle to Golden Meadow, the home of the defendant, Paris Theriot (R. 1, p. 61). Theriot had spent that Sunday afternoon at "Fisherman's Bar" on Grand Isle from about 1:00 or 2:00 P. M. to about 7:30 or 7:45 P. M., when he had driven toward Golden Meadow over this same highway (R. 1, pp. 55, 151). During that period Theriot estimated that "I drank between four and five drinks, something like that" of Scotch whiskey (R. 1, p. 56). The bartender's estimate of Theriot's drinks was: "To the best of my knowledge, I would say around eight or ten." (R. 1, p. 152.) That was scaled down from a statement in which he said that he had served Theriot "ten or fifteen Scotch and waters" (R. 1, p. 157).

At the time that Mercer was hit and killed, few people were traveling that highway.[5] Theriot admitted that between Fisherman's Bar and the location where Mercer's body was found he passed only one car, a truck (R. 1, pp. 180, 185). Another explanation for the fact that Mercer's body was not found until 6:30 A. M. on December 19th (R. 1, p. 28) is that the weather was rainy and foggy (R. 1, pp. 171, 184).

Suspicion fell on Theriot as soon as Mercer's body was found (R. 1, p. 87), and the officers quickly located Theriot's automobile, a 1955 or 1956 model Oldsmobile (R. 1, p. 88). It bore unmistakable evidence of a recent accident, a blow [fol. 394] to the right headlight and right front of the hood extending back to the windshield. On the cream or white colored hood was some blue coloring; "it had an appearance that it could have been done by clothing, since it was porouslike" (R. 1, pp. 108, 230). Mercer was wearing blue coveralls when struck (R. 1, pp. 85, 104). The rim of the headlight was missing (R. 1, p. 102). A medium size bath towel with red stains on it which appeared to be blood (R. 1, p. 116) was found concealed between the seat and the seat cover on the driver's side of the front seat (R. 1, pp. 141, 146). On the chassis underneath the car on the right front side were found hair particles or what looked like hair (R. 1, pp. 40, 46, 93, 122, 140, 160).[6]

When confronted by the officers with the evidence that his automobile had been involved in a recent accident, Theriot readily admitted that that was true, and fixed the time of the accident as noon or 12:15 on the same Sunday on which Mercer was killed (R. 1, pp. 72, 73) and the place as six or seven miles up the bayou from Golden

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[5] "Well, there was, on a Sunday like that, the tourists, but usually they leave early—I mean in the afternoon, so at that time, during the night, there's not too many people, but there was a few people on and off during the afternoon, the people at the bar coming in and out." (R. 1, p. 156.)

[6] As has been repeatedly said, verification of these findings became impossible when the samples taken by the officers disappeared from the files.

Meadow (R. 1, p. 73). He said that he had tried to pass a truck in front of him and "I hit the back of the truck with my right side of the car" (R. 1, p. 73). In Theriot's own language: "I just told you that I was coming, that I was going up the bayou, and I was looking aside when I noticed the truck in front. I tried to pass him on the side, and when I tried to pass him he pulled a little bit on the left, and I hit him right in the back, the piece underneath of the truck body, the body of the truck—it is a 2 or 3x10, [fol. 395] or 3x12 sticking out, two pieces like that (indicating with hands), and you've got the body of your truck right on that, and I hit the back part with the top of my headlight, in front. I put my brakes on, and when I saw it, I put the brakes on and I slid on the road and I go off of the road, and I came back slowly, and I just make it. I came back slowly on top, on the road there, and it was gone, I guess, off, and I looked at my car and I saw that it was not too much, and I looked in the back over there and I saw a piece of wood about that long, 26 or 30 inches (indicating with hands) long, and maybe a 6x6 or 6x8, and I threw it on the side of the road, and I turned back and I went right straight to Grand Isle. That's exactly the way that happened." (R. 1, p. 75.) See also R. 1, pp. 211, 162, 96. Theriot further testified: "The truck didn't stop—he kept on going. I couldn't check up on it." (R. 1, p. 76.) It seems to me that the probability or improbability of the truthfulness of that explanation presented a question for the jury.

That is especially true in the light of the testimony of Trooper Folse of the Louisiana State Police:

"Q. Isn't it also true that the car tracks of the vehicle, the vehicle tracks that you saw there did not careen back to the right and get back on the highway?

"A. According to the point where Mr. Theriot brought us, the car, if it swerved over to the left, did not come back to the right any time after it left the highway, if those are the marks.

"Q. In fact, whatever vehicle was in that place where [fol. 396] you saw, it had to be pulled out, didn't it?

"A. I would say that if it was soggy and wet, it had to be pulled out.

"Q. You say if it was soggy and wet? Was it?
"A. It was wet." (R. 1, p. 226.)

To Deputy Sheriffs Milliet and Guidry, the defendant Theriot gave an entirely different explanation of the recent accident to his automobile, namely that he had hit a cow (R. 1, pp. 117 and 138).

The defendant Theirot testified that nothing had been done to his car between the time of the accident on Sunday and of its inspection on Monday (R. 1, p. 66). However, the officers found the car covered with a white substance which appeared to be a film of soap left after a washing (R. 1, pp. 109, 116).

Effective December 31, after the accident on December 18, the defendant Theriot sold his business to his brother (R. 1, p. 51).

The circumstances are so numerous that some may have been unintentionally omitted. Those which I have recited, with references to record pages, seem to me ample to require the submission of this case to the jury.

In *Lincoln National Life Insurance Co.* v. *Roosth*, 5 Cir., 1962, 306 F. 2d 110, 113, we held that, "when the issue resolves itself, as it does so clearly here, into a question of whether the same body of evidence is enough to permit a jury submission, neither a subsequent, second, or third, [fol. 397] panel of this Court, nor the whole Court sitting en banc, should *ordinarily* undertake to review the correctness of the first decision or, doing so, arrive at a contrary conclusion." (Emphasis supplied.) In that case the first decision had reversed a judgment n.o.v. and remanded the case for a new trial. Upon the second appeal we affirmed the judgment entered upon the jury's verdict on new trial. Our added reluctance in that case to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such an inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from *Roosth*. The present case

seems to me not an "ordinary" one, not even a "close" case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination.

Assuming, however, that *Roosth* would require us to affirm the judgment of the district court in the absence of additional evidence, surely, with circumstantial evidence already of such weight, very little additional evidence would be needed to meet the requirement of our mandate; that is, that the evidence as a whole be of "sufficient probative force to justify submission of the cause to the jury." I think that the additional evidence was sufficient to justify a new trial.

It is true that most of the proffered additional testimony was rank hearsay developed in a fruitless effort to trace the lost items of evidence and particularly the rim off the right headlight of the defendant Theriot's Oldsmobile. However, the deposition of a witness not examined [fol. 398] on the first trial, Benny Verdon, discloses that he was among the first to reach the body of the deceased shortly after daybreak (p. 21, Verdon's Deposition), and furnishes positive evidence that Mercer was struck and run over by an automobile:

"Q. You just saw the tire marks that ran right off on the shoulder and right on his body and proceeded on down the road?

"A. That's right.

"Q. There was not any question about him being run over by an automobile?

"A. Oh, yes, he was run over by an automobile.

"Q. The evidence showed that?

"A. You could tell it.

"Q. It looked like he was hit in the back and run right over?

"A. Yes, sir.

"Q. And the mark of the tire of the car that did it was plainly visible on his shoulder there?

"A. Yes, sir." (p. 29, Verdon's Deposition.)

A copy of the report of the safety engineer and accident analyst that, in his opinion, the photographs and medical reports demonstrated that the damage to Theriot's car was caused by its impact with Mercer is attached as Appendix A to this dissenting opinion. On the first trial, the district court had refused to let the law officer witnesses testify as to their opinion of whether the type of indentation on the car was made by a soft or a hard object, on the ground that such testimony was "too speculative" (R. 1, p. 44) or that the witness was not qualified as an expert (R. 1, p. 110, see also R. 1, pp. 90-91). The proffered [fol. 399] testimony of the safety engineer and accident analyst was therefore not cumulative. Coming from an expert, that testimony, or most of it, was admissible.

> "A large class of cases, embracing statements as to the *probability* or the possibility of an event, the *capacity* or tendency of an act or a machine, the *cause* or the *effect* of a fact, may fairly be grouped together, because the reason why the Opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a quantity which lies in estimate only and is the result of a balancing of concrete data.
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> "This is no sufficient reason for excluding such statements from qualified witnesses; because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from him. All that can be said of the rulings is that probably some of them, in the final result of the litigation in hand, have done less actual harm to justice than others have done."

VII Wigmore on Evidence, 3rd ed., §1976, p. 121.

To repeat, if any evidence were needed to weight the scales in favor of sufficiency to justify submission of the issues to the jury, such evidence need be very slight. In my opinion, the deposition of Benny Verdon and the testi-

[fol. 400] mony of the safety engineer and accident analyst are enough.

I would accord the plaintiff what I believe to be her constitutional right to a trial by jury, and therefore respectfully dissent.

APPENDIX A

ACCIDENT ANALYSIS LABORATORY
Eight-Eleven North Virginia
Oklahoma City 6, Oklahoma

May 16, 1959

Ralph H. Snyder

Phone CEntral 2-1830
Post Office Box 3855

Mr. H. Alva Brumfield
Attorney at Law
205 American Bank Building
Baton Rouge, Louisiana

Re: Mercer vs. Theriot

Dear Mr. Brumfield:

I have made a very careful study and analysis of this case, based on the physical evidence as shown in the photographs of the damaged Oldsmobile automobile, the post mortem report showing the injuries to the deceased and the photographs taken at the scene of the accident before the deceased was removed.

[fol. 401] As I understand this case, the main issue is whether or not the damage to the Olds. automobile was caused by collision with the rear of a flat bed truck, or hitting the pedestrian.

A very minute examination of the damage to the Olds. discloses the following facts:

1. The initial blow or force which caused the downward bend in the right front headlamp, came from the

front and slightly to the right. Due to the top overhang of the headlamp rim, the top portion of the headlamp received most of the blow. This caused the headlamp assembly to tilt upward and backward, yet there is no visable (sic) dents or damage to the black plate rim around the headlamp and also the lens.

2. The two inward dents in the right side of the fender located above the right front wheel were caused by the blow or force coming from the front and not from any side blow.

3. The damage to the hood and fender located on the top right side and back toward the windshield, were caused by a blow coming from above, and an object large enough to cover the damaged area. The indentation in the hood was enough to bend up the corner of the hood approx. ½ inch.

4. While there appears to be colored streaks extending along the top of the fender from the damaged area backwards, there is no indication of scratches or indentations between the front and rear damaged areas.

[fol. 402] 5. An examination of the ridge of the right front bumper where it bends to the rear shows that this edge came into contact with some object which cleaned or wiped off the road grime and dirt. This is very evident when the photos are examined under a high power magnifying lens.

It is my understanding that the defendant claims that the car was damaged when he started around a flat bed truck and as he started around, the truck started to make a left turn or to swing to its left and the right front fender struck the left rear supporting joint of the truck. And that the blow was of enough force for a piece of wood (3" x 6" x 30") (approximate) to be knocked off the truck (I believe it was supposed to have been laying loose on the bed of the truck and not a portion of the truck bed or support) and that it was this piece of wood which came down on the rear of the hood and fender to cause the damage in that area.

I can find no mention made regarding the finding of the chromium headlamp rim. The type and extent of damage to this rim would be one of the most important bits of evidence, as it would clearly show the fact of the hardness of the object hit. The contact damage against the wood or metal of the truck bed would be entirely different than the damage made by striking a human or an animal.

ANALYSIS AND CONCLUSIONS: All of the physical evidence relative to the damage to the Olds. indicates that for this damage to have been caused by collision with the rear of a truck as described by the defendant would not be possible.

[fol. 403] 1. While it is possible for the damage to the fender just behind the headlamp to be caused by the car running into the joist on the truck, the amount of force necessary to bend the fender to the extent shown in the photos and also cause the fender to bend on the side area above the front wheel, the striking force against the truck joist by the headlamp rim would extend through the light chromium rim and would also bend the back plate. The back plate shows no bends. It would also break the headlamp glass. The glass is not broken.

2. The blue streaks extending back along the top of the fender and also found in the area of the dented area at the rear of the hood could only get there if the truck had scraped the top of the fender by the fender going on underneath the truck to the left of the joist. The fender top shows no scraping or denting, just a discoloration. This could not be possible if the fender went under the truck bed. The height of all truck beds (even the large trailer units) are too low to permit the front of an automobile to go underneath without bending and scraping. On most trucks the height is 2 to 3 inches lower.

3. If the front right fender hit the truck joist and slid under, then there would be damage to the right side of the fender caused by further contact with the joist, which is approx. 6 in. in height and extends below the truck bed for that distance.

4. The damaged area at the rear of the hood extends from the metal ridge which extends from the front ornament back to the edge of the hood, and also several inches into the top of the fender. This damage could not have [fol. 404] been caused by the initial impact with the front of the fender striking the truck (the front of the hood shows no impact damage), nor could it have been caused by the piece of wood, as described by the defendant, being knocked from the truck, going up into the air and coming down on the hood and fender. In the first place the impact force would not be of enough weight and would not have enough force to bend the hood and fender to the depth, width, and extent as shown in the photographs.

5. The "cleaned" area along the ridge of the front bumper could be explained as being caused by contact with the wheel flap or even the left rear wheel of the truck as the car came underneath the bed. Again, this would not be possible as the bumper would have to penetrate at least a foot or so underneath the truck bed for the bumper to contact the wheel and this would leave damage to the top of the fender, which is not present.

6. The physical damage to this car could not have been caused by collision with the rear of a truck such as described by the defendant.

In my opinion, this damage was caused by striking the pedestrian.

1. The "cleaned" area on the edge of the right front bumper was caused when the bumper struck the man's left leg. His tibia and fibula were fractured and if he was walking with his back to the car this would be the first striking point.

[fol. 405] 2. The damage to the headlamp rim and fender was caused when the car struck this man in the back. His post mortem report shows a ruptured spleen, renal arteries, etc., which would be the area struck by the headlamp and fender.

3. The area of damage at the rear of the hood was caused by the head and shoulders of the man striking as his body was flipped upward and backward. It would require the weight and force of an adult to bend the hood and fender to the width and depth if (sic) was bent.

4. None of the photographs are clear enough nor taken close enough for me to determine the type of discoloration left along the top of the fender and hood. From the description of the investigating officers' report, they described it as being "blue in color and of a porous texture, like made from a cloth." Such a discoloration could not be made by contact with the truck but could be from contact with the clothes of the deceased.

5. Mention is made of finding what appeared to be "human hairs" caught in the steering arm underneath the car. I do not give any weight to the fact that these would be hairs from the deceased, as there is no evidence that the car passed over his body. The body shows no tire marks and if the body was hit, thrown up and backward, striking at the back of the hood and then off the car, the front of the car would not have passed over his body unless the driver backed over the body or turned around and drove over the body. This is most unlikely.

6. Other factors which are difficult to understand if the [fol. 406] truck was hit by this car is why, with this amount of damage, would the defendant drive off without getting the truck driver's name and the license number for either trying to collect from the truck's insurance carrier or his own for repairs. Also, no mention was made of bringing in the piece of wood for evidence, nor if it was also blue in color. Where did the headlamp rim go?

In making this analysis I have to be as unbiased as possible in reaching my conclusions. However, the physical evidence is so clearly definite in proof that the damage to the Olds. automobile could not have been made by contact with the rear of a truck as described by the defendant, it leaves no recourse but to find that the damage could have

been caused by striking a pedestrian and that it is most likely that this is the car which struck the deceased.

Very truly yours,

(Signed) RALPH SNYDER
Ralph H. Snyder
Safety Engineer & Accident Analyst.

RHS:ms

Encls:
13 photos

[fol. 407] BROWN, Circuit Judge, Dissenting:

The question for review is whether, on the proceedings pursuant to our remand, the evidence of the total record was sufficient to raise a jury question. This is so because it was implicit in our remand that the District Judge was to consider not only whatever additional showing was made, but to consider it in the light of and as a part of the total record. If the evidence was sufficient to raise a jury question, then it was incumbent on the District Judge to grant a new trial. We did not mean to accord to the District Judge any discretion in determining that legal question. *Whiteman* v. *Pitrie*, 5 Cir., 1955, 220 F. 2d 914; *Kirby Lumber Corporation* v. *Laird*, 5 Cir., 1956, 231 F. 2d 812, 816. For all of the reasons so ably set forth by Judge Rives, the evidence was more than ample to compel a jury trial as a matter of law. Because of the unique nature of our remand, we are not on this appeal now faced with the *Roosth* problem or the desirability (or necessity) of modifying it.

GEWIN, Circuit Judge, Dissenting:

Believing that there is sufficient evidence to require a submission of the factual issues in this case to a jury for decision, I join in the dissent of Judge Rives.

[fol. 408] BELL, Circuit Judge, Dissenting:

I join in the dissent of Judge Rives with the following additional statement. My view in this case, as in *Lincoln National Life Insurance Company* v. *Roosth*, 5 Cir., 1962, 306 F. 2d 110, is based on the sufficiency of the evidence. I feel that the evidence, at least on the second hearing of this case was sufficient to make a jury issue. I felt that the evidence was insufficient in *Lincoln National*. The losing party there, as must be implicit here, suffered the misfortune of being caught up in the law of the case doctrine. But here that doctrine should play no part as there was sufficient additional evidence over what was presented on the first trial to take the case to the jury.

[fol. 409]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,068

D. C. Docket No. 6072 Civil

MRS. WANDA MERCER, Appellant,

VERSUS

PARIS THERIOT, Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before: Tuttle, Chief Judge, Hutcheson, Rives, Cameron, Jones, Brown, Wisdom, Gewin and Bell, Circuit Judges.

JUDGMENT—March 14, 1963

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court en banc upon the record and briefs on file;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

"Rives, Brown, Gewin and Bell, Circuit Judges, dissent."

Issued as Mandate:

[fol. 410] Petition for rehearing covering 14 pages filed April 4, 1963 omitted from this print.

It was denied, and nothing more by order May 9, 1963.

[fol. 423] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19068

[Title omitted]

Appeal from the United States District Court for the Eastern District of Louisiana.

ORDER DENYING PETITION FOR REHEARING—May 9, 1963

Before: Tuttle, Chief Judge, Hutcheson, Rives, Cameron, Jones, Brown, Wisdom, Gewin, and Bell, Circuit Judges, En Banc.

PER CURIAM:

It is ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is hereby Denied.

Rives, Brown, Gewin and Bell, C. J., Dissents.

[fol. 424] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 425]

SUPREME COURT OF THE UNITED STATES

No. 336, October Term, 1963

WANDA MERCER, Petitioner,

vs.

PARIS THERIOT.

ORDER ALLOWING CERTIORARI—November 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196.....

No. 336

MRS. WANDA MERCER, Petitioner

versus

PARIS THERIOT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Petitioner.

CAPITOL PRESS BATON ROUGE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 196 ..

No. _____

MRS. WANDA MERCER, Petitioner

versus

PARIS THERIOT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Mrs. Wanda Mercer, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

When this case was tried to a jury, resulting in a verdict for petitioner, the District Court entered judgment in accordance therewith, without written opinion. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the jury verdict, with directions to ente.. judgment for defendant unless petitioner made a satisfactory

showing that on another trial, evidence of sufficient probative force, warranting submission of the cause to the jury would be offered, in which case, the judgment would be for a new trial, is reported at 262 F.2d 754 (5th Cir. 1959), *certiorari denied*, 360 U. S. 914 (1959). The opinion of the District Court, appearing in the Record at page 352, (Appendix "C," *infra*, p. 54), refused to grant petitioner a new trial on grounds the additional evidence she presented was incompetent, and thus did not satisfy the mandate of the Court of Appeals for the Fifth Circuit. This judgment was affirmed by the United States Court of Appeals for the Fifth Circuit (Appendix "A," *infra*, pp. 25-53), reported at 316 F. 2d 635, sitting en banc, with four judges dissenting.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit in *Mercer v. Theriot*, (No. 19,068) was entered on March 14, 1963. (Appendix "B," *infra*, p. 53). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit can re-examine facts found by a jury contrary to the Seventh Amendment of the United States Constitution and decisions of this Court.

2. Whether the Court of Appeals for the Fifth Circuit can withhold a cause from the jury when reasonable men could draw different conclusions and inferences from the evidence presented.

STATUTES INVOLVED

1. Constitution of the United States, Amendment Seven.
2. Rule 61, Federal Rules of Civil Procedure.
3. Rule 43 (a), Federal Rules of Civil Procedure.

STATEMENT

Petititoner, Wanda Lane Mercer, and Byrd Mercer were married on May 5, 1948, and continued to reside as husband and wife up to the time of his death on December 18, 1955, for which she brought this wrongful death action. Byrd Mercer was then employed in construction work, laying a pipeline in the Gulf of Mexico, and was living with petitioner in a trailer court on Grand Isle, in the State of Louisiana, approximately four miles east of the docks where Mercer caught the boat which transported him to the job (R. 73).

After arriving at the dock after work on the evening of December 18, 1955, Mercer did not ride home with his coworkers as he customarily did (R. 170), and was last seen alive at approximately 7:00 P.M. (R. 166).

Paris Theriot, the defendant, had homes in Golden Meadow, Louisiana, as well as on Grand Isle (R. 48) and in December of 1955, was living in his Golden Meadow home (R. 49). Theriot, in partnership with his brother, Leo Theriot, owned an automobile agency selling Oldsmobiles and Chevrolets. The defendant went to Grand Isle on Sunday, December 18, 1955, for the stated purpose of selling an Oldsmobile to Leo Terrebonne (R. 54); defendant was driving a 1955 Oldsmobile painted white in front and red in back (R. 49). Theriot made a deal with Leo Terrebonne to sell him

an automobile, and then spent the afternoon in a tavern known as Fisherman's Bar in Grand Isle (R. 57). He admitted consuming four or five drinks of Scotch and water (R. 56), but the bartender, Louis Bradberry, stated he served Theriot ten or fifteen Scotch and water drinks (R. 157).

About 7:30 P.M., the defendant left Grand Isle to return to his home in Golden Meadow, traveling over Louisiana Highway 1, which is the only road on Grand Isle, going in an easterly direction (R. 61). The weather was foggy and rainy (R. 63).

Around 7:00 or 7:30 A.M., on Monday, December 19, 1955, petitioner was informed that her husband had been found dead on the right shoulder of Highway 1, on Grand Isle. The Coroner's certificate, introduced in evidence, marked Plaintiff Exhibit 2, shows that Mercer died on Grand Isle Road No. 1, about 7:30 P.M. December 18, near the Humble Oil Camp, and was thirty-two years of age, white; the final diagnosis as shown on the autopsy report of the pathologist, all as shown on Plaintiff's Exhibits 3, 3-A, 3-B and 4, indicated that the deceased died from fracture dislocation of the antlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of the skull; rupture of the spleen, liver and both renal arteries, laceration of scalp, face, right thigh, right hand and left leg (R. 28-29).

At approximately 10:00 A.M., on December 19, 1955, Deputy Sheriff Gautreau, in charge of the investigation of this death (R. 38), took photographs of the scene while the body was still in the position in which it had been found (R. 30), on the right side of the road going in the direction of

the bridge connecting the island with the mainland (R. 37, 84). The body was some two to three feet off the edge of the pavement (R. 45, 221). A spot of blood was observed by Officer Folse, in what appeared to be an automobile tire track, which ran off the road quite a way (R. 85). The decedent was wearing blue denim work clothes, and his lunch pail was found by the body at the side of the road (R. 85).

The investigating officers proceeded to Golden Meadow where they gave Theriot's car a careful examination; Deputy Sheriff Gautreau made six pictures of the automobile introduced in evidence as Plaintiff's Exhibits 7 through 13 (R. 35). These photographs, together with the testimony of the officers, revealed that Theriot's car was damaged; the right front fender was dented, the rim of the headlight missing, and there was a large indentation on the hood of the automobile (R. 92). Scrapings were taken by these officers of a blue colored spot, which appeared to be a dye stain, and also of a white substance, taken from the indented section, which appeared to be soap powder, in a film left on the surface of the car (R. 91, 92, 115); as well as a hair-like substance taken from the right front axle (R. 93, 115, 123). Former Deputy Sheriff Guidry found a towel in the car, between the back seat and the seat cover, bearing dark brownish spots appearing to be blood (R. 123, 146). This evidence along with the lunch pail, clothing and other articles were brought to the Sheriff's office whence they were to be sent to the Department of Public Safety's laboratory in Baton Rouge.

Deputy Prudhomme requested permission to bring this evidence to Baton Rouge, but was refused (R. 94). The evidence, along with Prudhomme's notes were found to have been tampered with, and then subsequently disappeared (R.

94). Several inquiries were made by Deputy Milliet and Officer Folse regarding the disappearance of the evidence, all to no avail (R. 228). Trooper Folse said that this evidence and the investigation made would furnish definite proof as to the identity of the driver responsible for Mercer's death (R. 226). Trooper Folse further testified without objection that he heard there had been a pay-off in the case (R. 229-233). Deputy Sheriff Milliet testified that he had been fired as a result of the case (R. 135).

Paris Theriot gave conflicting explanations as to the cause of the damage to his automobile. He told Deputy Milliet and former Deputy Guidry that he had hit a cow with his car the day before (R. 117, 142). He also told Trooper Folse and Deputy Prudhomme that he had collided with a truck which was proceeding in the same direction in which he was going, in which he ran off the road for some 150-200 feet and then pulled back onto the road (R. 211). The officers investigating the side of the highway saw no such markings. Trooper Folse testified that there was some evidence that a car had run off the highway but at that spot, the mud was so thick and wet that the only way the vehicle could have gotten back on the road was for it to have been pulled out. (R. 226).

It was shown that Paris Theriot sold his interest in the automobile agency business to his brother, effective December 31, 1955, less than two weeks after this accident. In addition, Theriot endorsed a note for one of his witnesses, Leo Terrebonne, in the amount of $20,000.00. Under Rule 43 (b) of the Federal Rules of Civil Procedure, the deposition of the defendant was offered in evidence out of the presence of the jury; which deposition shows that Theriot admitted

running over two other individuals. This evidence was ruled inadmissible by the trial judge who stated that if such evidence came out even without any prompting from any witness, the Court would immediately order a mistrial, and the excluded evidence was admitted for the record.

The jury returned a verdict for petitioner in the amount of $25,000.00, and judgment was entered on October 25, 1957, in conformity with the verdict, in denying defendant's motion for judgment notwithstanding the verdict and motion for new trial, the District Court gave as its reasons, the following: "No one who sat through this trial and heard the witness could reasonably come to any conclusion except the one the jury came to." (R. 302).

The Fifth Circuit Court of Appeals reversed the judgment of the District Court and remanded the case with directions to enter a verdict for the defendant, "*** unless plaintiff, within a time and under conditions to be fixed by the district judge, make a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot v. Mercer*, 262 F.2d 754, 761 (1959).

In response to the appellate court's mandate, petitioner presented the following evidence: a report by Dr. Ralph Snyder, safety engineer and accident analyst, made after a study of photographs of the defendant's damaged automobile, and ten depositions. The District Court denied petitioner's motion for a new trial for the reason that such evidence, ". . . while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. 352; Appendix "C,"

p. 54). Granting petitioner's motion for rehearing, the District Court observed: "There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man." (R. 363, Appendix "D," p. 56).

Following petitioner's appeal, the Court of Appeals for the Fifth Circuit, en banc, with four judges dissenting affirmed the lower court's judgment.

REASONS FOR GRANTING THE WRIT

The errors in the judgment of the Court of Appeals for the Fifth Circuit herein are most clearly stated by the Judge Rives' dissenting opinion and may be summarized as first, the ". . . Court's decision both on the original appeal, and on this appeal is in direct contravention of the mandate of the Seventh Amendment." (Appendix "A," p. 34); second, the Court of Appeals erroneously concluded that petitioner's evidence did not present a jury question because it was incompetent, despite the fact that petitioner had adduced admissible evidence from which conflicting inferences could be drawn, thus satisfying the standard of the quantum of proof necessary for a jury question under the decisions of this Court. Because this holding imposes strict and untoward limitations on the right to a jury trial, and the function of the jury as fact-finders, both of which have been reprobated by this Court, it is submitted that certiorari should be granted to consider these questions and rectify the errors below.

I. IN REEXAMINING FACTS PREVIOUSLY FOUND BY THE JURY, THE COURT OF APPEALS FOR THE

FIFTH CIRCUIT VIOLATED THE MANDATE OF THE SEVENTH AMENDMENT AS WELL AS THE SETTLED JURISPRUDENCE OF THIS COURT.

As Judge Rives observed in his dissenting opinion herein, ". . . the most practical and effective safeguard of liberty and justice is the right of trial by jury."[1] (Appendix "A," p. 34) Determinations of the jury must have binding force if such a right is to have any meaning; to this end the Seventh Amendment was enacted.[2] It is petitioner's contention that the action of the Court of Appeals herein, in reweighing the facts as previously found by the jury, is in direct conflict with this Court's commitment to the Constitutional guarantee embodied in the Seventh Amendment, zealously protected through the granting of certiorari in countless instances and subsequent reversal of lower courts' overturning of jury verdicts.[3]

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[1] In **Parsons v. Bedford, Breedlove & Robeson**, 3 Pet. 433, 443, 7 L.Ed. 732 (1830), this Court declared:
"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana."
Simler v. Conner, 368 U.S. 966, 83 S.Ct. 609, 7 L.Ed.2d 395 (1963), contains these words: "The federal policy favoring jury trials is of historic and continuing strength."

[2] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law." U.S. Const. Amend. 7.

[3] See Annot., **The Supreme Court's Review of Sufficiency of Evidence in Actions Under the Federal Employers' Liability Act**, 4 L.Ed. 2d 1787 (1959), and the dissenting opinion of Judge Clark, Chief Judge of the Court of Appeals for the Second Circuit, in **Filipek v. Moore-McCormack Lines**, 258 F.2d 734 (2d. Cir. 1958), in which over twenty cases are cited as examples in which this Court granted certiorari in order to restore jury verdicts reversed by Courts of Appeals.

The verdict herein was supported by ample evidence, according to the view of the trial judge, and the four dissenting judges on the Court of Appeals. The assumption of the jury's function by a Court of Appeals, under those circumstances cannot be permitted, according to this Court's unequivocal holding in *Dick v. New York Life Insurance Company*, 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed. 2d 935 (1959). In that federal diversity action, the jury determined that the insured had met his death accidentally, and did not take his own life, making the insurer liable to petitioner, as beneficiary under the policies, for double indemnity payments. Motions for directed verdict and judgment notwithstanding the verdict filed by the insurance company were denied by the trial judge. The Court of Appeals reversed, and dismissed the complaint, asserting that it was unable to believe that the decedent, an experienced hunter, could have possibly shot himself by accident, first by one barrel and then the other; therefore the question of whether the death was an accident was not a question of fact for the jury, and should not have been submitted.

Summarizing the evidence, all of which was circumstantial, this Court held that accidental discharge of the gun on another occasion had been testified to by one of petitioner's witnesses, together with facts tending to show suicide had not been contemplated by the insured, supported the verdict, which must be reinstated. The error of the Court of Appeals was described in the following manner:

> "In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not

> fire unless someone or something pulled the triggers. Petitioner's evidence on this score could support a jury conclusion that the gun might have fired accidentally from other causes.
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> • • •
>
> "After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a "first hand knowledge of the applicable state principles, believed the case should go to the jury."
>
> *Dick v. New York Life Insurance Company*, 359 U. S. at pp. 445-446.

In both the *Dick* decision and the case at bar, the evidence, circumstantial in nature owing to the unwitnessed deaths, convinced a federal district court, and a duly constituted jury; however, in the instant case, this conviction was also shared by four members of the bench of the Court of Appeals for the Fifth Circuit. There appears no way in which the opinion of the majority of the Court of Appeals herein can be reconciled with the *Dick* case, and, it is submitted, reversible error is present in the appellate court's failure to adhere to the jurisprudence of this Court.

The impropriety of reversals of jury findings in cases involving recovery under the Federal Employers' Liability Act, 45 U.S.C. § 51 et seq., has claimed this Court's attention on three recent occasions, *Basham v. Pennsylvania Railroad Company*, 83 S. Ct. 965 (1963); *Harrison v. Missouri Pacific Railroad Co.*, 83 S. Ct. 690 (1963); *Gallick v. Balti-*

more & Ohio Railroad Co., 369 U.S. 848, 83 S.Ct. 659, 8 L.Ed. 2d 8 (1963). In all of these decisions, it was found that the invasion of the jury's province of fact finding was unwarranted. In the *Gallick* case, petitioner sustained injury resulting from a bite of an insect allegedly attracted to a fetid pool allowed to remain near the work site by respondent. The Court of Appeals for the state of Ohio found the evidence insufficient with respect to the causal connection between the railroad's negligence and the insect bite and overturned petitioner's jury verdict. This holding was reversed by this Court, relying on the rule of *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 20, 64 S.Ct. 409, 88 L. Ed. 520 (1944), that appellate courts should not search the record in an attempt to find conflicts in the evidence, and thereafter take the case from the jury; moreover, the Court of Appeals' finding that direct evidence was needed concerning the origin of the offending insect in the pool was erroneous.

The same *Tennant v. Peoria* rule[4] is the basis[5] of this Court's reversal of the Fifth Circuit Court of Appeals judgment in *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107, 80 S.Ct. 173, 4 L.Ed. 172 (1958), in which the appellate court had used an incorrect standard in assessing the medical evidence bearing on the question of whether

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[4] The applicability of **Tennant v. Peoria** to cases other than those arising under the **Federal Employer's Liability Act** is demonstrated by citation of this case as authority for the amount of evidence needed to present a jury question in a suit under the Clayton Act, cited below, **Continental Co. v. Union Carbide**, 370 U. S. 690, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962).

[5] This principle is cited with approval by the Court of Appeals for the Fifth Circuit in **Great American Insurance Company v. Cutrer**, 298 F.2d 79 (5th Cir. 1962).

petitioner's accident reactivated or aggravated a previously existing latent tubercular condition, in an action brought under the Jones Act, 46 U.S.C. Sec. 688.

In Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355, 358-359, 82 S.Ct. 780, 8 L.Ed. 2d 284 (1962), this Court clearly delineated the jury's function as distinguished from that of the appellate court as follows:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than a District Court can predetermine them. The Seventh Amendment says that 'No fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.'"

By virtue of the well established line of jurisprudence[6] denying the Court of Appeals the power which it exercised herein, as set forth in *Atlantic and Gulf Stevedores, supra*, it is petitioner's contention the decision herein should not be permitted to stand, and certiorari should be granted to

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[6] Decisions holding that facts found by a jury cannot be reweighed are these: **Rogers v. Missouri Pacific R. Co.**, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957); **Ellis v. Union Pac. R. Co.**, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); **Lavendar v. Kurn**, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1546); **Eastman Kodak Company of New York v. Southern Photo Material Company**, 273 U.S. 359, 47 S.Ct. 400, 7 L.Ed. 684 (1927); **Panama R. Company v. Bosse**, 249 U.S. 359, 39 S.Ct. 211, 63 L.Ed. 468 (1919); **Jefferson v. Taiyo Katun, K. K.** 310 F.2d 582 (5th Cir. 1962); **State Farm Mutual Automobile Insurance Co. v. Canzoneri**, 297 F.2d 369 (5th Cir. 1961); **Johnson v. Hill**, 274 F.2d 110 (8th Cir. 1960); **Readnaur v. Commercial Standard Insurance Company**, 253 F.2d 907 (10th Cir. 1948); **Greyhound Corporation v. Dewey**, 240 F.2d 899 (5 Cir. 1957); **General Accident Fire & Life Assurance Corp. v. Zapel**, 231 F.2d 917 (5th Cir. 1956).

assure the continued vitality of the jury system as provided for in the Seventh Amendment.

II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING PETITIONER'S EVIDENCE WAS INSUFFICIENT TO JUSTIFY SUBMISSION OF THE CASE TO THE JURY

The opinion of the Court of Appeals reveals that it held on the first appeal there was a complete absence of any evidence of defendant's negligence (Appendix "A," p. 27), and that "The second appeal does not require a reconsideration of the merits." (Appendix "A," p. 31). With respect to the evidence offered by petitioner in the District Court, pursuant to the mandate of the Court of Appeals, it was held that the evidence contained in the depositions, ". . . lacked probative force because it was incompetent, not because it was indirect or circumstantial evidence." (Appendix "A," p. 33). With respect to the accident analyst's report, the Court observed: "It is of doubtful admissibility because it comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative." (Appendix "A," p. 33).

It is petitioner's position that the Court erroneously held that it was required to abide by its original decision

that there was total absence of probative facts,[7] and further, that the evidence presented by petitioner in response to the mandate, presented a submissible case according to the decisions of this Court and other Courts of Appeal, including those of the Fifth Circuit.

The rule with respect to the determination of the presence of a jury question has been defined by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 18 U.S. 54, 67-68, 63 S.Ct. 444, 87 L.Ed. 610 (1943), as follows:

> Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478.

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[7] In regard to the possibility of the Court of Appeals' first decision constituting the law of the case, preventing an appellate court ordinarily from reviewing the correctness and arriving at a contrary conclusion on the question of whether the same body of evidence is sufficient to permit jury submission, **Lincoln National Life Insurance Co. v. Roosth**, 306 F.2d 110, 113 (5th Cir. 1962), Judge Rives' dissenting opinion points out relative to the **Roosth** case:

> "In that case the first decision had reversed a judgment n.o.v. and remanded the case for a new trial. Upon the second appeal we affirm the judgment entered upon the jury's verdict on new trial. Our added reluctance to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from Roosth. The present case seems to me not an 'ordinary' one, not even a close' case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination." (Appendix "A," p, 41).

Examples of reconsideration and reversals of former holdings **Cochran v. M & M Transp. Co.**, 110 F.2d. 519 (1st Cir. 1940), and **In Re Allied Electric Products, Inc.**, 194 F. Supp. 28 (D. C. N. J. 1961).

> Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."[8]

A more recent statement of the rule appears in *Continental Co. v. Union Carbide*, 370 U.S. 690, 700-701, 82 S.Ct. 1404, 8 L.Ed. 2d 777 (1962), involving a suit by petitioner under § 4 of the Clayton Act, 15 U.S.C. § 15:

> "Undoubtedly all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusions as to the facts,' *Tennant v. Peoria & P. U. R. Co.*, 321 U.S. 29, 35."

Schulz v. Pennsylvania Railroad Company, 350 U. S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956), illustrates the op-

[8] To the same effect: **Baker v. Texas & Pacific Railway Co.**, 359 U.S. 227, 79 S.Ct. 664, 3 L.Ed. 2d 756 (1959); **Davis v. Virginia Railway Co.**, 361 U.S. 354, 80 S.Ct. 387, 4 L.Ed. 2d 366 (1960); **Berry v. United States**, 312 U.S. 450, 61 S.Ct. 637, 85 L.Ed. 945 (1941); **Texas & Pacific Railway Company v. Harvey**, 228 U.S. 319, 33 S.Ct. 518, 57 L.Ed. 852 (1913); **Kreigh v. Westinghouse Co.**, 214 U.S. 249, 29 S.Ct. 619, 53 L.Ed. 984 (1909); **Gardner v. Michigan Central Railroad**, 150 U.S. 349, 14 S.Ct. 140, 37 L.Ed. 1107 (1893); **McQueen v. Navajo Freight Lines, Inc.**, 293 F.2d 590 (8th Cir. 1961); **Dickerson v. Shepard Warner Elevator Co.**, 287 F.2d 255 (6th Cir. 1961); **Central Truck Lines, Inc., v. Lott**, 249 F.2d 722 (5th Cir. 1957); **William v. National Surety Corporation**, 257 F.2d 771 (5th Cir. 1958); **Greyhound Corporation v. Dewey**, 240 F.2d 889 (5th Cir. 1957); **Western Production Company v. Yarbrough**, 234 F.2d 889 (5th Cir. 1956); **Roundtree v. Post**, 134 F. 2d 340 (5th Cir. 1943); James, **Sufficiency of the Evidence and Jury Control Devices Available Before Verdict**, 47 Va. L.Rev. 218 (1961).

eration of this rule in a case depending wholly on circumstantial evidence. Petitioner sued for the wrongful death of her husband who had been employed by respondent as a tug fireman. He was last seen at 1:25 a.m., walking in the direction of a tug, and several weeks later his body was discovered in the water near an adjacent pier; he had drowned, and there were no witnesses who could testify as to the attendant facts. It was shown that the decedent had to take care of four tugs by himself, and was obliged to step from one boat to another with no illumination except his flashlight. The District Court ordered the jury to return a verdict for defendant since the only things that had been established was an accidental death and some evidence of negligence, but "not a shred of evidence connecting the two." The Court of Appeals affirmed, with the comment that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to the defendant's breach of duty," it failed to show "where the accident occurred," or "that it was proximately caused by any default on the part of the defendant." This Court granted certiorari and reversed for these reasons:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this

> case from the jury because of a possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found (had the court allowed it to perform its function) but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn.'"
> *Schulz* v. *Pennsylvania Railroad Company*, 350 U.S. 526.

The evidence in the instant case is likewise circumstantial, but this in no way lessens its probative value.* It was Judge Rives view, expressed in his dissenting opinion herein, that after a review of the facts reflected in the State-

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* **Rogers v. Missouri Pacific R. R. Co.**, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1956); **Holmes v. Goldsmith**, 147 U. S. 150, 3 S.Ct. 288, 37 L.Ed. 118 (1892); **The Robert Edwards**, 6 Wheat. 187 5 L.Ed. 238 (1821); **Sitta v. American Steel and Wire Div. of U.S. Steel Corp.**, 254 F.2d 12 (6th Cir. 1958); **Korel v. United**, 246 F.2d 425 (4th Cir. 1957); **Gearhardt v. American Reinforced Paper Co.**, 244 F.2d 920 (7th Cir. 1957); **Pritchard v. Nelson**, 228 F.2d 878 (2nd Cir. 1955); **Williams v. Reading Co.**, 175 F.2d 32 (3rd Cir. 1949); **Pruitt v. Hardware Dealers Mut. Fire Inc.**, 112 F. 2d 140 (5th Cir. 1940); **Sears Roebuck v. Peterson**, 76 F.2d 243 8th Cir. 1935); **National Biscuit Co. v. Litzky**, 22 F.2d 939 (6th Cir. 1927); **Penn. Co. v. Zahner Metal Sash & Door Co.**, 273 Fed. 993 (6th Cir. 1921).

ment, *infra*, pp. 3-8, that the case should have been submitted to the jury, for these reasons:

> "This is true because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. *Vick v. United States*, 5 Cir., 1954, 216 F.2d 228, 233; see *Wong Sun and James Wah Toy v. United States*, U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: 'Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver.' 61 C.J.S. p. 212, Motor Vehicles, § 511 (4)."

Appendix "A." p. 36.

Petitioner submits that the Court of Appeals, on the first appeal of this case erred in disregarding petitioner's evidence, since it was admissible and of significant probative force. In the alternative, even if the evidence introduced at the trial must be ignored, the depositions and exhibits furnished in response to the mandate of the Fifth Circuit presented a question of fact that should have been resolved by the jury in accordance with the principles stated in the foregoing cases.

On the second appeal, it was held that the evidence presented was incompetent, which, petitioner urges, was erroneous. Statements contained in the depositions to the effect that the witnesses heard the rim of an Oldsmobile

was found near the body of the decedent, for which a sum of money was paid, as well as testimony regarding reports that the evidence gathered during the examination of defendant's car had been destroyed for a price paid did not violate the hearsay rule. Such statements were admissible for the fact that they were made, as explained in 6 Wigmore, *Evidence*, Sec. 1766, p. 180 (1940):

> "The classes of utterances thus exempt (from the hearsay rule) may be grouped under three heads:
> "3. Utterances used circumstantially as giving rise to indirect inferences, but not as assertions to prove the matter asserted."[10]

An example of the operation of this rule, is found in *Scholle v. Cuban Venezuelan Oil Voting Trust*, 2 Cir., 285 F.2d 318 (2d Cir. 1960), in which statements made to plaintiff that certain individuals offered to lend him shares as collateral for a loan were designated competent evidence which had been erroneously excluded, as shown by the following portion of the opinion:

> "Since the statements were relevant, they should have been admitted unless barred by some exclusionary rule. The court below excluded the evidence as hearsay, and no other reason for exclusion has been suggested. But the hearsay rule does not bar admission of the statements used circumstantially, since, when so used the primary focus of inquiry is whatever inferences can be drawn from the

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[10] See, **Aikens v. United States**, 282 F.2d 53 (10th Cir. 1960); **United States v. Gavagan**, 280 F.2d 319 (5th Cir. 1960); Note, 46 Iowa L. Rev. 210, 215 (1961); Note 40 Minn L. Rev. 455 (1956); Note, 5 Okla. L. Rev. 270, 273 (1952).

> fact the words were spoken and not the truth of what was said."

Scholle v. Cuban Venezuelan Oil Voting Trust, supra, at p. 321.

It is petitioner's position that these depositions were another link between Paris Theriot and the death of Byrd Mercer; as such, they were admissible and competent evidence from which the jury could draw reasonable inferences. Moreover, the photographs of defendant's car, together with the statements of the investigating officers concerning its appearance, and the substances taken from it, as well as facts regarding the accident scene, were highly relevant, and presented facts upon which reasonable minds could differ, in accordance with the test for a jury question enunciated above.

With respect to the report of Mr. Ralph Snyder, it is petitioner's contention that this expert's opinions are admissible and do not deprive the jury of its function of finding ultimate facts, as held by the Court of Appeals for the Fifth Circuit, Appendix "A," p. 33. On the contrary, this Court has held such testimony proper in *Eastern Transportation Lines v. Hope*, 95 U. S. 297, 24 L.Ed. 477 (1897), in which it was explained:

> "It is not an objection, as is assumed, that he is asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness."

Eastern Transportation Lines v. Hope, 95 U.S. at p.

298. To the same effect are these decisions: *Union Insurance Company of Philadelphia v. Smith*, 124 U. S. 8 S.Ct. 544, 31 L.Ed. 505 (1888; *Texas and Pacific Railway Company v. Watson*, 190 U. S. 287, 23 S.Ct. 681, 47 L.Ed. 1059 (1903); *Carlson v. Chisholm-Moore Hoist Corp.*, 281 F.2d 766 (2nd Cir. 1960).; *Fequer v. United States*, 302 F.2d 214 (8th Cir. 1962); *Nordmeyer v. Sanzone*, 314 F.2d 202 (6th Cir. 1963); *Kennelley v. Travelers Insprance Company*, 273 F.2d 479 (5th Cir. 1960); *Peoples Gas Company of Kentucky* v. *Fitzgerald*, 188 F.2d 198 (6th Cir. 1951).

Such a restrictive view of the admissibility of evidence is not in harmony with the pertinent authorities or the liberal policy of Rule 43(a) of the Federal Rules of Civil Procedure. An examination of this evidence unquestionably leads to the conclusion that facts are in dispute, and conflicting inferences could be drawn from proper evidence; hence, there can be no justification for the appellate court's withholding the case from the jury.

CONCLUSION

In the case at bar, the Court of Appeals for the Fifth Circuit, on the first appeal, reversed a jury verdict; on the second appeal, the same court refused to allow the case to be submitted to the jury. It would seem that a clearer example of "judicial erosion" of the "essential guarantee of the Seventh Amendment," described by Mr. Justice Black, in his dissenting opinion, with whom Mr. Justice Douglas and Mr. Justice Murphy concurred, dissenting, in *Galloway v. United States*, 319 U. S. 372, 63 S.Ct. 1233, 87 L.Ed. 1546 (1942), could not be imagined. No better expres-

sion of the far reaching effect of this process could be cited than the following portion of Mr. Justice Black's, opinion:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. . . . I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." *Galloway v. United States*, 319 U. S. at p. 407.

It is respectfully submitted that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

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205 American Bank Building
Baton Rouge, Louisiana
Attorneys for Mrs. Wanda
Mercer, Petitioner

PROOF OF SERVICE

I, H. Alva Brumfield, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for writ of Certiorari on Mr. Stanley E. Loeb, counsel for respondent by mailing a copy thereof, postage prepaid, addressed to his office at 318 Richards Building, New Orleans, Louisiana.

Dated this ..... day of August, 1963.

H. ALVA BRUMFIELD

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19068

MRS. WANDA MERCER,

Appellant,

versus

PARIS THERIOT,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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(March 14, 1963)

Before TUTTLE, Chief Judge, HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, En Banc.

WISDOM, Circuit Judge: In the early hours of the morning of December 19, 1955, Willie B. Mercer's body was

found face down on the side of Highway 1 on Grand Isle, Louisiana. The coroner's certificate shows that he died about 7:30 p.m. December 18. Tire marks leading to the body indicated that Mercer was run over while he was on the shoulder of the road. Around 7:30 p.m. on December 18 Paris Theriot, the defendant, had left Fisherman's Bar on Grand Isle, taking Highway 1 to return to his home in Golden Meadow. The chronology and the fact that he had been drinking in Fisherman's Bar since one o'clock pointed to Theriot. In addition, the investigating officers recalled that Theriot had run over and killed a pedestrian in each of two accidents twenty or twenty-five years ago. The police investigation disclosed that the right front fender of Theriot's automobile was dented and the rim of the right headlight missing. There was also a large dent on the hood of the car. Theriot gave two different explanations for the damage to his car: he said that he had run into a cow and he said that a four by six piece of lumber had dented the hood when he ran into a lumber truck. A deputy sheriff found a blue mark on the hood; Mercer had been wearing blue denim overalls. Another deputy found "hair-like substances" underneath the car, a towel bearing reddish stains, and a white powdery substance on the car that appeared to be soap powder from a recent car-washing. The officer took scrapings of the blue spot, the hair-like substances, and the white powder and placed these in envelopes. The envelopes, the towel, and certain other articles were brought to the office of the Sheriff of Jefferson Parish and placed in the "evidence locker." This evidence disappeared before the trial and before any of it could be analyzed.

The decedent's wife brought a wrongful death action against Theriot resulting in a jury verdict in her favor for

$25,000. On appeal, this Court, Judge Hutcheson presiding and writing the opinion for the Court, unanimously decided that the judgment should be reversed with directions to enter a verdict for the defendant. *Theriot v. Mercer*, 5 Cir., 1959, 262 F. 2d 754; certiorari denied, 360 U. S. 914 (1959). The Court pointed out that highly prejudicial testimony, which should not have been admitted, and inflammatory trial tactics of the plaintiff's attorney had the effect of denying the defendant a fair trial.[1] The Court rested its decision on insufficiency of the evidence to support the verdict: there was a "complete absence of any evidence, circumstantial or otherwise, that Theriot's car struck the deceased or that Theriot was in anywise negligent." 262 F.2d at 759. Nevertheless, the Court felt that the plaintiff should be given an opportunity to better her presentation of the case by producing additional evidence—if she could—to justify a new trial. The mandate therefore directed the district court

". . . to enter a judgment for the defendant unless

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[1] "In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominoting the trial, deprived the defendant of his day in court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption." (262 F. 2d 754, 758)

"We, therefore, agree with the appellee's statement on page 6 of her brief that, although the defendant denied making a pay-off or giving any political contribution to the sheriff in the sheriff's race that was going on at that time (and nobody gave testimony to the contrary), the jury nevertheless convicted Theriot of making such a pay-off. Indeed it was the admission of **this wholly inadmissible and highly prejudicial hearsay testimony**, the introduction of which should have caused a mistrial, which changed the cause from a suit for damages into an inquisition into fraud and wrong doing in the sheriff's office, a matter which, in the state of the evidence, had nothing to do with the case and could have had no effect on it except the unlawful one of depriving the defendant of a fair trial on the charge of negligence made but not proven." (262 F. 2d at 757)

> plaintiff, within a time and under condition to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot v. Mercer*, 262 F. 2d 754, 761.

In accordance with the mandate, the trial court notified the plaintiff that judgment would be entered for the defendant unless she tendered sufficient evidence to justify submission of the cause to the jury. The plaintiff then filed a "motion for a new trial" and submitted as supporting evidence a report and certain depositions from police officers. The report was a statement from a safety engineer and accident analyst that, in his opinion, the photographs and medical reports demonstrated that the damage to Theriot's car was caused by its impact with Mercer. The depositions showed some skullduggery in the sheriff's office with regard to the missing evidence and indicated also that some of the officers had heard that Theriot had purchased the missing headlight rim from someone who had found it at the scene of the accident. The district court denied the motion for a new trial. "The evidence," a minute entry states, "while persuasive, would be inadmissible in a new trial." Leaning over backwards to be fair, the Court granted a rehearing. On rehearing, the district judge stated from the bench that there was no question in his mind "that there was a denial of justice in this case" and no question in his "mind either that Paris Theriot killed this man," but he felt compelled to deny the motion on the ground that the evidence tendered was not competent, and that the plaintiff had not met the conditions

for a new trial required by the mandate.[2] The plaintiff now appeals from this denial of the motion for a new trial.

On this second appeal the panel to which the case was assigned on its own motion invoked a hearing en banc. The Court en banc affirms the action below and dismisses the appeal.

I.

If the order now appealed from had indeed been an order denying a "motion for a new trial" as the plaintiff termed it, the order would be unappealable. *Soble v. Diatz*, D. C. Cir., 1951, 189 F. 2d 26; *Bass v. B. & O. Terminal Co.*, 7 Cir., 1944, 142 F. 2d 779, cert. den'd 323 U. S. 775. But the motion is not the motion for a new trial contemplated in Fed. R. Civ. P. 59. Such a motion "serve[s] the function

[2] The district court stated:

"[T] Fifth Circuit ruled that there was not sufficient evidence to support the verdict. And that unless the Plaintiff was able to, on his motion for a new trial, to advance additional evidence which would make out a case for the Jury, the verdict for the Defendant should be granted. And after reviewing the new evidence which the Plaintiff provided, I felt that while the evidence was persuasive and it showed skulduggery in this case, that the sheriff's locker had been rifled and the evidence which was taken from Paris Theriot's car was destroyed so it couldn't be produced in his criminal case or civil case involving this death, there was still no direct evidence. There was just talk among the deputies who were concerned with obtaining the evidence and who, unfortunately, were unable to get the evidence when they went to the locker to get it in order to bring it to the laboratory to have it examined. I felt that the evidence, as produced under the application for new trial, was not competent evidence. In other words, it would have violated the hearsay rule if admitted, and that is the basis on which I denied the application for a new trial.

"It is my view the Fifth Circuit did say that as tried originally there was not sufficient evidence. There is no doubt that it said that unless additional substantial evidence was presented on application for new trial, the verdict should be for the Defendant. This was the basis of my ruling."

of allowing a party to seek to have the trial court correct errors, both of fact and law, that [occur] in the trial of the action." 6 Moore's Federal Practice 59.03 (1961). An order for a new trial reopens the issues of an action for a new trial on the merits, in whole or in part, *before* an appeal on the merits. Here, however, the plaintiff's motion served a different function. It was filed in direct response to the invitation in this Court's mandate that the plaintiff present new evidence. If the plaintiff had made "a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury [would] be offered," the plaintiff would have been entitled to a "judgment for a new trial." Denial of the motion was a final decision by the district court that the plaintiff had failed to meet the terms of the mandate. The Court therefore holds that in the circumstances of this case the denial of the motion was an appealable order.

II.

The argument is made that since the district court entered judgment in compliance with the mandate on the former appeal, the judgment is not appealable. The contention is, that when judgment is entered after a new trial there is no question of jurisdiction to entertain a subsequent appeal; but when there has been no new trial, as in this case, the judgment entered is that of the appellate court itself and there is simply nothing from which to appeal. This rule has been consistently followed in this circuit. See *Davis v. United States*, 5 Cir., 1957, 244 F. 2d 309; *Amalgamated Assn. etc. v. Southern Bus Lines, Inc.*, 5 Cir., 1953, 201 F. 2d 53; *Seagraves v. Wallace*, —, —, — F. 2d—, at 163.

But the appellant is not appealing from a decree that

is in effect the decree of the court issuing the mandate. The mandate left open the question of the sufficiency of the additional evidence to support a new trial; the order therefore adjudicated a subsequent issue not determined by the judgment which was the basis for the mandate. The appellant contends that the district court misconstrued the mandate and was guilty of an abuse of judicial discretion in deciding the issue created by the mandate. An appeal lies, therefore, to review the action of the district court to determine whether it gave effect to the mandate. *In re Sandford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; *Metcalf v. City of Watertown*, 1895, 68 Fed. 859; *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 1944, 142 F. 2d 549, *cert. den'd* 320 U. S. 661, 64 S. Ct. 268, 88 L. Ed. 376.

III.

The second appeal does not require a reconsideration of the merits. The narrow questions before the Court en banc are whether the district court properly construed the mandate and whether the district court abused its discretion in holding that the plaintiff failed to meet the terms of the mandate, that is, failed to make a satisfactory showing that the *additional* evidence would justify submission of the case to the jury. Accordingly, it is unnecessary to consider the application of the "law of the case doctrine." See *Lincoln National Life Insurance Company v. Roosth*, 5 Cir., 1962, — F. — 2d.

A. This Court directed that a new trial be granted upon plaintiff's showing evidence of "sufficient probative force to justify submission of the cause to the jury." Instead, the appellant argues, the district judge adopted a different, more

stringent requirement. He required that the evidence be "additional" and "direct."

We hold that the district judge properly construed the mandate. The mandate is meaningless unless it refers to "additional" evidence, for the former opinion holds that the evidence in the record was insufficient to support a verdict and judgment for the plaintiff. It is true that the district judge referred to the lack of new "direct" evidence but the basis for his holding was that the evidence offered was hearsay and incompetent, not that it w. indirect and circumsta al.

The appellant argues also that a reading of the Court's first opinion shows the chief ground for reversal to have been counsel's inflammatory trial tactics. To overcome this, counsel argues, it is necessary only to have a new trial which, he assures us, can be had in an atmosphere free from all overtones of passion and prejudice. This proposed solution o ersimplifies the problem. In its original opinion the Court severely condemned the trial tactics of the plaintiff's counsel and disapproval of the trial judge's admitting certain testimony that was irrelevant and prejudicial, but the court squarely held that the evidence was insufficient to support the verdict. The mandate looked to new probative evidence sufficient to justify a new trial, not to a new trial on counsel's promise to avoid improper tactics; otherwise, the Court would simply have remanded the case for trial.

B. Coming now to the sufficiency of the additional evidence to justify a new trial, we find ourselves in agreement with the district judge.

In support of his motion for a new trial the defendant offered ten depositions, seven from witnesses who had tes-

tified at the trial. Most of this "evidence" related to the missing headlight rim. The depositions show that up and down the bayou there were people who knew people who knew that there was a going price for the missing headlight rim. There were conflicting rumors that Prudhomme had the rim, or Verdon had the rim, or Guidry had the rim, or Nolte Theriot had the rim, and that the defendant had purchased it. But Prudhomme testified that he did not have the rim; someone had told him that Guidry had it and was holding it for $10,000. Guidry said he had heard that Theriot's son had the rim. Verdon denied having found the rim and denied that anybody told him that anyone had found the rim. Nolte Theriot said that he had had nothing to do with the rim. Gilbert Duet testified that a deputy sheriff "just passing through" had told him that he had heard that the rim had been found but he did not say who had found it. The depositions contain testimony of no higher degree of reliability relating to a "report" of a pay-off, presumably by Theriot, to some person (unknown) who destroyed the evidence in the Sheriff's "evidence locker." In short, the additional evidence was hearsay of the rankest sort. It lacked probative force because it was incompetent, not because it was indirect or circumstantial evidence.

The accident analyst's report adds little support to the plaintiff's cause. It is of doubtful admissibility because it comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative.

The district judge correctly interpreted the mandate and correctly ruled that the additional evidence was of insufficient probative value to justify a new trial. The judgment is

AFFIRMED.

RIVES, Circuit Judge, Dissenting:

In my opinion, the most practical and effective safeguard of liberty and justice is the right of trial by jury. In the words of Patrick Henry, "Trial by jury is the best appendage of freedom."[1] I recognize that there are many eminent lawyers and judges who do not share that view, and that the right of trial by jury is subjected daily to every form of attack, direct and indirect. Such persistent and constant warfare makes it all the more necessary for the defenders of that right to bear in mind that, "Eternal vigilance is the price of liberty."

Whatever may be our differences of opinion as to the intrinsic merits or demerits of trial by jury, there can be no dissent from the proposition that we are each and all bound by the plain language of the Seventh Amendment, and that language bears repeating:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

With the utmost respect for and deference to the views of my brother judges, it is my duty to express my own considered judgment that this Court's decision both on the original appeal[2] and on this appeal is in direct contravention of the mandate of the Seventh Amendment.

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[1] 3 Elliotts Debates 324.

[2] Theriot v. Mercer, 5 Cir., 1959, 262 F. 2d 754.

A thorough reading and study of the evidence on the original trial leave me with a clear understanding and approval of the jury's verdict for the plaintiff. I can well appreciate the remark of the learned and experienced trial judge, Honorable J. Skelly Wright, made when he denied the defendant's motion for judgment notwithstanding the verdict: "No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to."

This Court's opinion to the contrary on first appeal did not convince Judge Wright, for in denying the plaintiff's later filed motion for new trial,[3] he said: "There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man."

We deal here with a sorry mess where the evidence which might have established the defendant's guilt or innocence with certainty has been destroyed or irretrievably lost as the result of criminal misconduct on the part of someone. The remaining circumstantial evidence might not sustain a criminal prosecution and conviction of the defendant, but it is, I submit, amply sufficient to support a jury's verdict for the plaintiff in a civil action for damages.

The issues presented to the jury on the first trial, and found in favor of the plaintiff, were thus stated in the court's charge.

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[3] Though immaterial for present purposes, I do not agree with the majority statement that, "If the order now appealed from had indeed been an order denying a 'motion for a new trial,' as the plaintiff termed it, the order would be unappealable." As one of the decisions to the contrary, I note that we reversed an order denying a motion for new trial in Whiteman v. Petrie, 5 Cir., 1955, 220 F. 2d 914.

"The issue here is very simple: Did the Defendant, Paris Theriot, kill Byrd Mercer? And, if so, was he guilty of negligence in so doing, which proximately caused that death? That is the sole issue here, whether the Defendant killed Mercer, and if he did, was the death a result of negligence proximately caused by the Defendant Paris Theriot." (R. 1, p. 282.)[4]

In judging the sufficiency of the evidence to justify or support a verdict for the plaintiff, those issues can be narrowed to one; that is, was there substantial evidence from which the jury could reasonably conclude that the defendant, Paris Theriot, killed Byrd Mercer. That is true because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. *Vick v. United States*, 5 Cir., 1954, 216 F. 2d 228, 233; see *Wong Sun and James Wah Toy v. United States*, U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: "Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver." 61 C.J.S. p. 212, Motor Vehicles, §511 (4).

That the jury could reasonably conclude that a preponderance of the evidence proved that the defendant Paris Theriot killed Byrd Mercer is shown, I submit, by the following catalogue of the evidence. According to the death certificate Byrd Mercer died on Sunday evening, December 18, 1955 at 7:39 p. m. (R. 1, p. 28.) His body was found on

[4] I refer to the record on first trial as R. 1.

the island, Grand Isle, on the right side of the road going toward the bridge leading to the mainland (R. 1, p. 37). The body was two to three feet off the edge of the black top (R. 1, p. 45). Tire marks near his body ran off the road for quite a way, and his body was right next to the tire marks (R. 1, p. 85). An autopsy revealed evidences of a violent blow. " 'Fractured dislocation of atlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of skull; rupture of spleen, liver, and both renal arteries; lacerations of scalp, face, right thigh, right hand and left leg.' " (R. 1, pp. 28, 29.)

The road was the only highway leading from Grand Isle to Golden Meadow, the home of the defendant, Paris Theriot (R. 1, p. 61). Theriot had spent that Sunday afternoon at "Fisherman's Bar" on Grand Isle from about 1:00 or 2:09 P. M. to about 7:30 or 7:45 P.M., when he had driven toward Golden Meadow over this same highway (R 1, pp. 55, 151). During that period Theriot estimated that "I drank between four and five drinks, something like that" of Scotch whiskey (R. 1, p. 55). The bartender's estimate of Theriot's drinks was: "To the best of my knowledge, I would say around eight or ten." (R. 1, p. 152.) That was scaled down from a statement in which he said that he had served Theriot "ten or fifteen Scotch and waters" (R. 1, p. 157).

At the time that Mercer was hit and killed, few people were traveling that highway.[3] Theriot admitted that between

[3] "Well, there was, on a Sunday like that, the tourists, but usually they leave early—I mean in the afternoon, so at that time, during the night, there's not too many people, but there was a few people on and off during the afternoon, the people at the bar coming in and out." (R. 1, p. 156.)

Fisherman's Bar and the location where Mercer's body was found he passed only one car, a truck (R. 1, pp. 180, 185). Another explanation for the fact that Mercer's body was not found until 6:30 A.M. on December 19th (R. 1, p. 28) is that the weather was rainy and foggy (R. 1, pp. 171, 184).

Suspicion fell on Theriot as soon as Mercer's body was found (R. 1, p. 87), and the officers quickly located Theriot's automobile, a 1955 or 1956 model Oldsmobile (R. 1, p. 88). It bore unmistakable evidence of a recent accident, a blow to the right headlight and right front of the hood extending back to the windshield. On the cream or white colored hood was some blue coloring; "it had an appearance that it could have been done by clothing, since it was porouslike" (R. 1, pp. 108, 230). Mercer was wearing blue coveralls when struck (R. 1, pp. 103). The rim of the headlight was missing (R. 1, p. 102). A medium size bath towel with red stains on it which appeared to be blood (R. 1, p. 116) was found concealed between the seat and the seat cover on the driver's side of the front seat (R. 1, pp. 141, 146). On the chasis underneath the car on the right front side were found hair particles or what looked like hair (R. 1, pp. 40, 46, 93, 122, 140, 150).*

When confronted by the officers with the evidence that his automobile had been involved in a recent accident, Theriot readily admitted that that was true, and fixed the time of the accident as noon or 12:15 on the same Sunday on which Mercer was killed (R. 1, pp. 72, 73) and the place as six or seven miles up the bayou from Golden Meadow (R. 1, 73). He said that he had tried to pass a truck in front of him and

* As has been repeatedly said, verification of these findings became impossible when the samples taken by the officers disappeared from the files.

"I hit the back of the truck with my right side of the car" (R. 1, p. 73). In Theriot's own language: "I just told you that I was coming, that I was going up the bayou, and I was looking aside when I noticed the truck in front. I tried to pass him on the side, and when I tried to pass him he pulled a little bit on the left, and I hit him right in the back, the piece underneath of the truck, the body of the truck—it is a 2 or 3x10. or 3x12 sticking out, two pieces like that (indicating with hands), and you've got the body of your truck right on that, and I hit the back part with the top of my headlight, in front. I put my brakes on, and when I saw it, I put the brakes on and I slid on the road and I go off of the road, and I came back slowly, and I just make it. I came back slowly on top, on the road there, and it was gone, I guess, off, and I looked at my car and I saw that it was not too much, and I looked in the back over there and I saw a piece of wood about that long, 25 or 30 inches (indicating with hands) long, and maybe a 6x6 or 6x8, and I threw it on the side of the road, and I turned back and I went right straight to Grand Isle. That's exactly the way that happened." (R. 1, p. 75) See also R. 1, pp. 211, 162, 96. Theriot further testified: "The truck didn't stop—he kept on going. I couldn't check up on it." (R. 1, p. 76.) It seems to me that the probability or improbability of the truthfulness of that explanation presented a question for the jury.

That is especially true in the light of the testimony of Trooper Folse of the Louisiana State Police:

> "Q. Isn't it also true that the car tracks of the vehicle, the vehicle tracks that you saw there did not careen back to the right and get back on the highway?

"A. According to the point where Mr. Theriot brought us, the car, if it swerved over to the left, did not come back to the right any time after it left the highway, if those are the marks.

"Q. In fact, whatever vehicle was in that place where you saw, it had to be pulled out, didn't it?

"A. I would say that if it was soggy and wet, it had to be pulled out.

"Q. You say if it was soggy and wet? Was it?

"A. It was wet." (R. 1, p. 226.)

To Deputy Sheriffs Milliet and Guidry, the defendant Theriot gave an entirely different explanation of the recent accident to his automobile, namely that he had hit a cow (R. 1, pp. 117 and 138).

The defendant Theriot testified that nothing had been done to his car between the time of the accident on Sunday and of its inspection on Monday (R. 1, p. 66). However, the officers found the car covered with a white substance which appeared to be a film of soap left after a washing (R. 1, pp. 109, 116).

Effective December 31, after the accident on December 18, the defendant Theriot sold his business to his brother (R. 1, p. 51).

The circumstances are so numerous that some may have been unintentionally omitted. Those which I have recited, with references to record pages, seem to me ample to require the submission of this case to the jury.

In *Lincoln National Life Insurance Co. v. Roosth*, 5 Cir., 1962, 306 F. 2d 110, 113, we held that, "when the issue resolves itself, as it does so clearly here, into question of whether the same body of evidence is enough to permit a jury submission, neither a subsequent, second, or third, panel of this Court, nor the whole Court sitting en banc, should *ordinarily* undertake to review the correctness of the first decision or, doing so, arrive at a contrary conclusion." (Emphasis supplied.) In that case the first decision had reversed a judgment n.o.v. and remanded the case for a new trial. Upon the second appeal we affirmed the judgment entered upon the jury's verdict on new trial. Our added reluctance in that case to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such an inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from *Roosth*. The present case seems to me not an "ordinary" one, not even a "close" case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination.

Assuming, however, that *Roosth* would require us to affirm the judgment of the district court in the absence of additional evidence, surely, with circumstantial evidence already of such weight, very little additional evidence would be needed to meet the requirement of our mandate; that is, that the evidence as a whole be of "sufficient probative force to justify submission of the cause to the jury." I think that the additional evidence was sufficient to justify a new trial.

It is true that most of the proffered additional testimony was rank hearsay developed in a fruitless effort to

trace the lost items of evidence and particularly the rim off the right headlight of the defendant Theriot's Oldsmobile. However, the deposition of a witness not examined on the first trial, Benny Verdon, discloses that he was among the first to reach the body of the deceased shortly after daybreak (p. 21, Verdon's Deposition), and furnishes positive evidence that Mercer was struck and run over by an automobile:

"Q. You just saw the tire marks that ran right off on the shoulder and right on his body and proceed on down the road?

"A. That's right.

"Q. There was not any question about him being run over by an automobile?

"A. Oh, yes, he was run over by an automobile.

"Q. The evidence showed that?

"A. You could tell it.

"Q. It looked like he was hit in the back and run right over?

"A. Yes, sir.

"Q. And the mark of the tire of the car that did it was plainly visible on his shoulder there?

"A. Yes, sir." (p. 29, Verdon's Deposition.)

A copy of the report of the safety engineer and accident analyst that, in his opinion, the photographs and medical

reports demonstrated that the damage to Theriot's car was caused by its impact with Mercer is attached as Appendix A to this dissenting opinion. On the first trial, the district court had refused to let the law officer witnesses testify as to their opinion of whether the type of indentation on the car was made by a soft or a hard object, on the ground that such testimony was "too speculative" (R. 1, p. 44) or that the witness was not qualified as an expert (R. 1, p. 110, see also R. 1, pp. 90-91). The proffered testimony of the safety engineer and accident analyst was therefore not cumulative. Coming from an expert, that testimony, or most of it, was admissible.

> "A large class of cases, embracing statements as to the *probability* or the possibility of an event, the *capacity* or tendency of an act or a machine, the *cause* or the *effect* of a fact, may fairly be grouped together, because the reason why the Opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a quantity which lies in estimate only and is the result of a balancing of concrete data.
>
> "This is no sufficient reason for excluding such statements from qualified witnesses; because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from him. All that can be said of the rulings is that probably some of them, in the final result of the litigation in hand, have done less actual harm to justice than others have done."

VII Wigmore on Evidence, 3rd ed., §1976, p. 121.

To repeat, if any evidence were needed to weight the scales in favor of sufficiency to justify submission of the issues to the jury, such evidence need be very slight. In my opinion, the deposition of Benny Verdon and the testimony of the safety engineer and accident analyst are enough.

I would accord the plaintiff what I believe to be her constitutional right to a trial by jury, and therefore respectfully dissent.

APPENDIX A

ACCIDENT ANALYSIS LABORATORY
Eight-Eleven North Virginia
Oklahoma City 6, Oklahoma
May 16, 1958

Ralph H. Snyder

Phone CEntral 2-1830
Post Office Box 3855

Mr. H. Alva Brumfield
Attorney at Law
205 American Bank Building
Baton Rouge, Louisiana

Re: Mercer vs. Theriot

Dear Mr. Brumfield:

I have made a very careful study and analysis of this case, based on the physical evidence as shown in the photo-

graphs of the damaged Oldsmobile automobile, the post mortem report showing the injuries to the deceased and the photographs taken at the scene of the accident before the deceased was removed.

As I understand this case, the main issue is whether or not the damage to the Olds. automobile was caused by collision with the rear of a flat bed truck, or hitting the pedestrian.

A very minute examination of the damage to the Olds. discloses the following facts:

1. The initial blow or force which caused the downward bend in the right front headlamp, came from the front and slightly to the right. Due to the top overhang of the headlamp rim, the top portion of the headlamp received most of the blow. This caused the headlamp assembly to tilt upward and backward, yet there is no visible (sic) dents or damage to the black plate rim around the headlamp and also the lens.

2. The two inward dents in the right side of the fender located above the right front wheel were caused by the blow or force coming from the front and not from any side blow.

3. The damage to the hood and fender located on the top right side and back toward the windshield, were caused by a blow coming from above, and an object large enough to cover the damaged area. The indentation in the hood was enough to bend up the corner of the hood approx. ½ inch.

4. While there appears to be colored streaks extending along the top of the fender from the damaged area back-

wards, there is no indication of scratches or indentations between the front and rear damaged areas.

5. An examination of the ridge of the right front bumper where it bends to the rear shows that this edge came into contact with some object which cleaned or wiped off the road grime and dirt. This is very evident when the photos are examined under a high power magnifying lens.

It is my understanding that the defendant claims that the car was damaged when he started around a flat bed truck and as he started around, the truck started to make a left turn or to swing to its left and the right front fender struck the left rear supporting joint of the truck. And that the blow was of enough force for a piece of wood (3" x 6" x 30") (approximate) to be knocked off the truck (I believe it was supposed to have been laying loose on the bed of the truck and not a portion of the truck bed or support) and that it was this piece of wood which came down on the rear of the hood and fender to cause the damage in that area.

I can find no mention made regarding the finding of the chromium headlamp rim. The type and extent of damage to this rim would be one of the most important bits of evidence, as it would clearly show the fact of the hardness of the object hit. The contact damage against the wood or metal of the truck bed would be entirely different than the damage made by striking a human or an animal.

ANALYSIS AND CONCLUSIONS: All of the physical evidence relative to the damage to the Olds. indicates that for this damage to have been caused by collision with the rear of a truck as described by the defendant would not be possible.

1. While it is possible for the damage to the fender just behind the headlamp to be caused by the car running into the joist on the truck, the amount of force necessary to bend the fender to the extent shown in the photos and also cause the fender to bend on the side area above the front wheel, the striking force against the truck joist by the headlamp rim would extend through the light chromium rim would also bend the back plate. The back plate shows no bends. It would also break the headlamp glass. The glass is not broken.

2. The blue streaks extending back along the top of the fender and also found in the area of the dented area at the rear of the hood could only get there if the truck had scraped the top of the fender by the fender going on underneath the truck to left of the joist. The fender top shows no scraping or denting, just a discoloration. This could not be possible if the fender went under the truck bed. The height of all truck beds (even the large trailer units) are too low to permit the front of an automobile to go underneath without bending and scraping. On most trucks the height is 2 to 3 inches lower.

3. If the front right fender hit the truck joist and slid under, then there would be damage to the right side of the fender caused by further contact with the joist, which is approx. 6 in. in height and extends below the truck bed for that distance.

4. The damaged area at the rear of the hood extends from the metal ridge which extends from the front ornament back to the edge of the hood, and also several inches into the top of the fender. This damage could not have been

caused by the initial impact with the front of the fender striking the truck (the front of the hood shows no impact damage), nor could it have been caused by the piece of wood, as described by the defendant, being knocked from the truck, going up into the air and coming down on the hood and fender. In the first place the impact force would not be of enough weight and would not have enough force to bend the hood and fender to the depth, width, and extent as shown in the photographs.

5. The "cleaned" area along the ridge of the front bumper could be explained as being caused by contact with the wheel flap or even the left rear wheel of the truck as the car came underneath the bed. Again, this would not be possible as the bumper would have to penetrate at least a foot or so underneath the truck bed for the bumper to contact the wheel and this would leave damage to the top of the fender, which is not present.

6. The physical damage to this car could not have been caused by collision with the rear of a truck such as described by the defendant.

In my opinion, this damage was caused by striking the pedestrian.

1. The "cleaned" area on the edge of the right front bumper was caused when the bumper struck the man's left leg. His tibia and fibula were fractured and if he was walking with his back to the car this would be the first striking point.

2. The damage to the headlamp rim and fender was caused when the car struck this man in the back. His post

mortem report shows a ruptured spleen, renal arteries, etc., which would be the area struck by the headlamp and fender.

3. The area of damage at the rear of the hood was caused by the head and shoulders of the main striking as his body was flipped upward and backward. It would require the weight and force of an adult to bend the hood and fender to the width and depth if (sic) was bent.

4. None of the photographs are clear enough nor taken close enough for me to determine the type of discoloration left along the top of the fender and hood. From the description of the investigating officers' report, they described it as being "blue in color and of a porous texture, like made from a cloth." Such a discoloration could not be made by contact with the truck but could be from contact with the clothes of the deceased.

5. Mention is made of finding what appeared to be "human hairs" caught in the steering arm underneath the car. I do not give any weight to the fact that these would be hairs from the deceased, as there is no evidence that the car passed over his body. The body shows no tire marks and if the body was hit, thrown up and backward, striking at the back of the hood and then off the car, the front of the car would not have passed over his body unless the driver backed over the body or turned around and drove over the body. This is most unlikely.

6. Other factors which are difficult to understand if the truck was hit by this car is why, with this amount of damage, would the defendant drive off without getting the truck driver's name and the license number for either trying

to collect from the truck's insurance carrier or his own for repairs. Also, no mention was made of bringing in the piece of wood for evidence, nor if it was also blue in color. Where did the headlamp rim go?

In making this analysis I have to be as unbiased as possible in reaching my conclusions. However, the physical epidence is so clearly definite in proof that the damage to the Olds. automobile could not have been made by contact with rear of a truck as described by the defendant, it leaves no recourse but to find that the damage could have been caused by striking a pedestrian and that it is most likely that this is the car which struck the deceased.

Very truly yours,

(Signed) RALPH SNYDER
Ralph H. Snyder
Safety Engineer & Accident
Analyst.

RHS:ms

Encls:
13 photos

BROWN, Circuit Judge, Dissenting:

The question for review is whether, on the proceedings pursuant to our remand, the evidence of the total record was sufficient to raise a jury question. This is so because it was implicit in our remand that the District Judge was to consider not only whatever additional showing was made, but to consider it in the light of and as a part of the total record. If the evidence was sufficient to raise a jury question, then it was incumbent on the District Judge to grant a new trial. We did not mean to accord to the District Judge any discertion in determining that legal question. *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F. 2d 914; *Kirby Lumber Corporation v. Laird*, 5 Cir. 1956, 231 F. 2d 812, 816. For all of the reasons so ably set forth by Judge Rives, the evidence was more than ample to compel a jury trial as a matter of law. Because of the unique nataure of our remand, we are not on this appeal now faced with the *Roosth* problem or the desirability (or necessity) of modifying it.

GEWIN, Circuit Judge, DISSENTING:

Believing that there is sufficient evidence to require a submission of the factual issues in this case to a jury for decision, I join in the dissent of Judge Rives.

BELL, Circuit Judge, DISSENTING:

I join in the dissent of Judge Rives with the following additional statement. My view in this case, as in *Lincoln National Life Insurance Company v. Rooth*, 5 Cir., 1962, 306 F. 2d 110, is based on the sufficiency of the evidence. I feel that the evidence, at least on the second hearing of this case was sufficient to make a jury issue. I felt that the evidence was insufficient in *Lincoln National*. The losing party there, as must be implicit here, suffered the misfortune of being caught up in the law of the case doctrine. But here that doctrine should play no part as there was sufficient additional evidence over what was presented on the first trial to take the case to the jury.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1961

No. 19,068

D. C. Docket No. 6072 Civil

MRS. WANDA MERCER,

Appellant,

versus

PARIS THERIOT,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

Before: Tuttle, Chief Judge, Hutcheson, Rives, Cameron, Jones, Brown, Wisdom, Gewin and Bell, Circuit Judges.

JUDGEMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court en banc upon the record and briefs on file;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

"Rives, Brown, Gewin and Bell, Circuit Judges, dissent."

March 14, 1963

Issued as Mandate:

APPENDIX "C"

Minute Entry
Wright J.
Dec. 12, 1960

MRS. WANDA MERCER — No. 6072
v. — CIVIL ACTION
PARIS THERIOT

This case came on for hearing on a former day on motion of plaintiff for a new trial. The court, having heard the argument of counsel and studied the briefs submitted in support thereof, is now ready to rule.

IT IS ORDERED that the motion of plaintiff for a new trial be, and the same is hereby, DENIED.

REASONS

This court has carefully studied the additional evidence submitted in support of the motion for new trial. This evidence, while persuasive, would be inadmissible in a new trial under the hearsay rule.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MRS. WANDA MERCER
versus
PARIS THERIOT

CIVIL ACTION
NUMBER 6072

MOTION OF PLAINTIFF FOR REHEARING OF PLAINTIFF'S MOTION FOR NEW TRIAL PREVIOUSLY DENIED ON 12-12-60.

EXCERPT

APPEARANCES:

H. ALVA BRUMFIELD, Esq.
205 American Bank Bldg.
Baton Rouge, Louisiana
Attorney for Plaintiff.

STANLEY E. LOEB, Esq.
LOEB & LIVAUDAIS
Richards Building,
New Orleans, Louisiana
Attorney for Defendant.

(The above entitled and numbered matter came up for hearing on this, the 4th day of January, 1961, in the Courtroom, United States Post Office Building, New Orleans, Louisiana; THE HONORABLE J. SKELLY WRIGHT, District Judge, presiding.)

APPENDIX D

PROCEEDINGS

THE COURT: We will now take up the matter in Civil Action No. 6072.

(Argument by Mr. Brumfield.)

THE COURT: There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man. But, I will hear from the other side.

(Argument by Mr. Loeb.)

THE COURT: I will have another look at this matter but my impression is, as stated on the ruling for application for a new trial, that the Fifth Circuit ruled that there was not sufficient evidence to support the verdict. And that unless the Plaintiff was able to, on his own motion for a new trial, to advance additional evidence which would be substantial in nature and which would make out a case for the Jury, the verdict for the Defendant should be granted. And after reviewing the new evidence which the Plaintiff provided, I felt that while the evidence was persuasive and it showed skulduggery in this case, that the sheriff's locker had been rifled and the evidence which was taken from Paris Theriot's car was destroyed so it couldn't be produced in his criminal case or civil case involving this death, there was still no direct evidence. There was just talk among the deputies who were concerned with obtaining the evidence and who, unfortunately, were unable to get the evidence when they went to the locker to get it in order to bring it to the

laboratory to have it examined. I felt that the evidence, as produced under the application for a new trial, was not competent evidence. In other words, it would have violated the hearsay rule if admitted, and that is the basis on which I denied the application for a new trial.

It is my view the Fifth Circuit did say that as tried originally there was not sufficient evidence. There is no doubt that it said that unless additional, substantial evidence was presented on application for a new trial, the verdict should be for the Defendant. That was the basis of my ruling, but I am willing to have another look at it because of the feelings that you have presented in this case. I do believe that I am going to be required to reaffirm the ruling that I previously made. I will mark the matter submitted.

Court stands at recess.

(Whereupon, Court recessed.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 336

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY E. LOEB
318 Richards Building
New Orleans, Louisiana 70112
Attorney for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

Number 336

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

OPPOSITION TO PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND TO ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent, Paris Theriot, respectfully prays that this Honorable Court reject petitioner's application for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in proceedings number 19,068 of the docket of that court affirming the judgment of the United States District Court for the Eastern

District of Louisiana, Honorable J. Skelly Wright, Judge Presiding, which refused plaintiff's motion for a new trial.

Citations to the decisions of the inferior courts herein are: Theriot v. Mercer, 5 Cir., 262 F. 2d 754; Mercer v. Theriot, 5 Cir., 316 F. 2d 635 (the instant case). This case has heretofore been before Your Honors on petition for certiorari, certiorari denied 359 U. S. 983; rehearing denied 360 U. S. 914.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 United States Code, Section 1254.

QUESTIONS PRESENTED

In her petition for certiorari, petitioner sets forth two questions presented. In fact, there is but one question presented, namely, whether a Circuit Court of Appeals may examine the testimony and evidence in any case to determine whether there is in the record competent evidence sufficient to support a verdict.

STATUTES INVOLVED

Petitioner lists three statutes under this heading. There are, in fact, four statutes, since this is a diversity case and is grounded upon Louisiana's Death by Wrongful Act Statute, which is Louisiana Revised Civil Code Article 2315[1].

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[1]Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, . . . or spouse of the deceased, or either of them, . . . for the space of one year from the death. . . ."

STATEMENT OF THE CASE

Petitioner's statement of the case is, obviously, argumentative and respondent submits that Circuit Judge Wisdom fairly states the case in his opinion complained of.[2]

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner attempts to establish in this Court that the Court of Appeals reviewed the facts and came to conclusions contrary to those found by the jury. The Court of Appeals considered only questions of law properly presented under the jurisprudence and under the Seventh Amendment to the Constitution of the United States.

The issues before the Court of Appeals were (1) whether the District Court's refusal of a new trial was an appealable order and, if so, (2) whether the District Court erred in its refusal to grant petitioner a new trial. The latter consideration involves the interpretation placed by the District Judge on the mandate of the Court of Appeals in the first appeal, Theriot v. Mercer, 262 F. 2d, 754 at 761, thus:

> ". . . to enter a judgment for defendant unless plaintiff, within a reasonable time and under conditions to be fixed by the District Judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial."

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[2]Appendix, P 13 Infra.

The Court of Appeals held that the District Judge had properly interpreted the mandate aforesaid and the Court reviewed the proffered evidence and concluded that the District Judge was correct in his ruling. That is the appeal complained of and which forms the basis of the petition now before Your Honors.

ARGUMENT

As has been heretofore stated, this is a diversity case. The action is grounded on Louisiana's Death by Wrongful Act Statute which provides for recovery by certain beneficiaries from a defendant whose negligence or fault caused the death of plaintiff's decedent.[3] The inquiry in the courts below was leveled at the sufficiency of the evidence proffered by petitioner to establish, first, that respondent did, in fact, drive his automobile into and against the person of petitioner's deceased husband at the place where his body was found and, second, whether any of the proffered evidence could establish actionable negligence in respondent under Louisiana law.

Discussion of the evidence adduced on the trial and which was the subject of petitioner's first appeal is of little value here, since the evidence is thoroughly discussed in the opinion of the Court of Appeals in Theriot v. Mercer, 262 F. 2d 754. However, petitioner complains that the Court of Appeals was without right to review the evidence

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[3]Jones v. Texas & P. Ry. Co., 125 La. 542, 51 So. 582, 136 Ann. St. Rep. 339; Lange v. Illinois Cent. R. Co., 107 La. 687, 31 So. 1003; Larkin v. State Farm Mut. Auto. Ins. Co., 233 La. 544, 97 So. 2d 389.

adduced on the trial and challenges the correctness of the Court of Appeals' first judgment herein by asserting that the appellate court sifted the evidence and arrived at conclusions contrary to those of the jury. There is no merit to that contention and it is submitted that the opinion of the Court of Appeals speaks for itself. If the appellate court had the right in law to review the evidence for the purpose of determining whether there was any competent, probative evidence to support the verdict of the jury then the court was within its right in reversing the judgment of the District Court which was rendered on the jury's verdict.

Where Rule 50 (b) has been complied with, as was done in this case, the re-examination prohibition of Amendment 7 of the Constitution of the United States does not preclude a Federal District Court from entering judgment notwithstanding the verdict, or preclude an appellate court from making such disposition when, as a matter of law, a motion for directed verdict should have been granted. Cone v. West Virginia Pulp and Paper Co., 330 U. S. 212, 67 S. Ct. 752, 91 L. Ed. 849; Globe Liquor Co. v. San Roman, 332 U. S. 571, 68 S. Ct. 246, 92 L. Ed. 177; Ryan Distributing Corp. v. Caley, 3rd Cir., 147 F. 2d 138; Montgomery Ward & Co. v. Duncan, 311 U. S. 243, 61 S. Ct. 189, 85 L. Ed. 174; Simerson v. St. Louis and S. F. R. Co., 8th Cir. 173 F. 2d 612. And, where a motion for a directed verdict is timely made at the close of plaintiff's case and repeated at the close of the entire case, the appellate court may examine the evidence to the extent of determining whether there is sufficient probative, competent evidence to take the case to the jury and this raises only a question of law. Slocomb v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct.

523, 57 L. Ed. 879; Fairmount Glass Works v. Cub Fork Coal Co. 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439; Galloway v. United States, 319 U. S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458; Minniehaha County S. Dakota v. Keller, 8th Cir., 150 F. 2d 365.

If there be a constitutional prohibition against the United States Circuit Courts of Appeals reviewing evidence for the purpose of determining the competency thereof, then the Courts of Appeals have no function in those civil cases wherein juries have returned their verdicts. Even in F. E. L. A. cases the Courts of Appeals maintain their function of reviewing the evidence to determine whether there is sufficient evidence of employer negligence to support the verdict. It is true that recent decisions of this Court have to some extent curtailed the scope of review in F. E. L. A. cases but the fundamental rule of law applies that verdicts must be supported by competent, probative evidence and may not be predicated merely on surmise or conjecture.

> "To sustain petitioner, one would have to infer from no evidence at all that the train stopped where and when it did for no purpose at all, contrary to all good railroading practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. Speculation cannot supply the place of proof. Galloway v. United States, 319 U. S. 372, 395, 63 S. Ct. 1077, 1089, 87 L. Ed. 1458" Moore v. Chesapeak & Ohio Railway Co., 340 U. S. 573, 71 S. Ct. 428, 95 L. Ed. 547.

Therefore, if the Court of Appeals had the legal right to review the evidence on the first appeal herein, its judgment thereon should be considered final for that court itself has thrice reviewed its own decision, namely, on petition for rehearing and again when the second appeal was considered and on petition for rehearing in the second appeal. Also, as is heretofore stated herein, Your Honors considered the question on petitioner's first application for writ of certiorari.

The argument submitted by petitioner resolves itself into the complaint of the District Court's refusal to grant her a new trial and the judgment of the Court of Appeals affirming the District Court. So, it becomes appropriate to discuss the evidence proffered by petitioner in support of her motion for a new trial.

In the effort to meet the requirements of the mandate of the Court of Appeals, petitioner took the depositions of respondent and of ten witnesses, seven of whom had testified on the trial.

1. The deposition of Douglas M. Milliet taken on August 26, 1959 and again on October 16, 1959 shows that the sheriff's office and state police conducted a search for a headlight rim in the area where decedent's body was found. Milliet testified that he had heard that someone had found the rim and had demanded a sum of money and that it had been 'put up for auction.' Milliet would not give the name of the individual he had heard had found the rim. District Judge Wright subsequently ordered the witness to divulge the aforesaid information and on October 16, 1959 Milliet testified that he had heard but could not

say who told him, that Deputy Sheriff Benny Verdun had found the rim. He did not remember hearing that any price had been paid for the lost rim. Douglas Milliet had testified on the trial.

2. The deposition of respondent was taken on August 26, 1959 and there is no evidence in his deposition concerning the lost rim. The examination of respondent was levelled at his finances and bank balances and petitioner's counsel was apparently endeavoring to discover the payment of a large sum of money by respondent following the accident. None was found.

3. The testimony of William Joseph Gautreau, Jr. was taken on August 26, 1959. He had also testified on the trial and his deposition is primarily concerned with photographs he made following the accident.

4. On the same date, August 26, 1959, petitioner took the deposition of Nelson Guidry, who had also testified at the trial. Guidry testified that there were rumors and that he had heard that someone had found the rim but he did not know who had found it and that the whole matter was the subject of rumor and hearsay.

5. The deposition of Hubert L. Prudhomme was taken on August 26, 1959 and he testified that he had heard that someone had found the rim and that someone had told him that Milliet had accused him of finding the rim and selling it. Prudhomme denied ever talking to respondent about the alleged pay-off. Prudhomme refused to divulge the name of the individual who, according to the rumor, had the rim and, on order of court directing him to do so,

he testified on November 13, 1959 that someone had told him that Nelson Guidry had the rim and wanted $5,000.00 for it but Guidry denied it.

6. On September 30, 1959 petitioner took the deposition of Justice of the Peace T. Mercedes Adam. She denied being at the scene of the accident and knowing anything about it except hearing gossip.

7. Deputy Sheriff Verdun's deposition was taken on September 30, 1959 and he denied having found the rim and denied that anybody told him that anyone had found the rim. He even denied hearing rumors about it.

8. State Trooper Jesse M. Folse's deposition was taken on September 30, 1959 and he testified that he had had a conversation with Douglas Milliet about the missing evidence but denied hearing that anyone had gotten a payoff. He testified that he had heard that Deputy Guidry had the rim but that Milliet had told him that Deputy Prudhomme had it.

9. On October 9, 1959 the deposition of Gilbert Duet was taken and he testified that a Jefferson Parish deputy "just passing through" had told him that he had heard that the rim had been found but he did not say who had found it.

10. On October 16, 1959 the deposition of Nolan Plaisance was taken. He shed no light on the rumors and gossip about the rim.

On November 13, 1959 Nelson Guidry was again cross-examined and his deposition shows that he had heard that respondent's son had the rim.

11. On November 20, 1959 respondent's son, Nolty J. Theriot, was cross-examined and his deposition reflects his denial that he had found the rim.

The foregoing is set forth herein to reflect the reasons for the comment made by Circuit Judge Wisdom regarding the aforesaid "evidence":

> "In short, the additional evidence was hearsay of the rankest sort. It lacked probative force because it was incompetent not because it was indirect or circumstantial evidence." (316 F. 2d 635 at 639.)

Petitioner places reliance on the unsupported letter report addressed to petitioner's counsel by one Ralph H. Snyder under date of May 16, 1958. That report is unsupported by any affidavit or other verification and represents the conclusion of an individual who styles himself an "accident analyst" and, admittedly, is based upon that which had been told to him and certain photographs. However, the Court of Appeals considered that so-called report in arriving at its conclusion and a study of the report will reflect the correctness of the opnion of the Court below. There are no statements of fact contained in the Snyder report, on the contrary, there are five separate and distinct conclusions made in the first portion thereof and under the heading "Analysis and Conclusions" the aforesaid are repeated. In addition, the author of the report did not have the opportunity to examine the automobile in question nor

the clothing worn by decedent and arrived at his opinions and conclusions based solely upon the study of certain photographs. The material is hearsay and cumulative and is of no evidentary value unless the verity of the information upon which it is based had been established. Such is not the case. Further, the conclusions of the author of the report certainly usurp the province of the jury.

But even if the report were admissible in evidence and constituted proof positive that respondent's automobile struck decedent, there is still lacking any evidence that could tend to establish by that degree of judicial certainty necessary to support a verdict that respondent was negligent and that his negligence was the proximate cause of the accident.

In conclusion, it is respectfully submitted that petitioner's application for certiorari should be denied.

Respectfully submitted,

STANLEY E. LOEB

318 Richards Building
New Orleans, Louisiana 70112
Attorney for Paris Theriot,
Respondent

PROOF OF SERVICE

I, Stanley E. Loeb, attorney for respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition to Petition for Writ of Certiorari on H. Alva Brumfield, Esquire, and Miss Sylvia Roberts, 205 American Bank Building, Baton Rouge, Louisiana, by mailing the same, United States postage prepaid, addressed as hereinabove set forth.

New Orleans, Louisiana, September ____, 1963.

Stanley E. Loeb

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19063

MRS. WANDA MERCER,
Appellant,

versus

PARIS THERIOT,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(March 14, 1963)

Before TUTTLE, Chief Judge, HUTCHESON, RIVES, CAMERON, JONES, BROWN, WISDOM, GEWIN, and BELL, En Banc.

WISDOM, Circuit Judge: In the early hours of the morning of December 19, 1955, Willie B. Mercer's body was found face down on the side of Highway 1 on Grand Isle, Louisiana. The coroner's certificate shows that he died

about 7:30 p. m. December 18. Tire marks leading to the body indicated that Mercer was run over while he was on the shoulder of the road. Around 7:30 p. m. on December 18 Paris Theriot, the defendant, had left Fisherman's Bar on Grand Isle, taking Highway 1 to return to his home in Golden Meadow. The chronology and the fact that he had been drinking in Fisherman's Bar since one o'clock pointed to Theriot. In addition, the investigating officers recalled that Theriot had run over and killed a pedestrian in each of two accidents twenty or twenty-five years ago. The police investigation disclosed that the right front fender of Theriot's automobile was dented and the rim of the right headlight missing. There was also a large dent on the hood of the car. Theriot gave two different explanations for the damage to his car: he said that he had run into a cow and he said that a four by six piece of lumber had dented the hood when he ran into a lumber truck. A deputy sheriff found a blue mark on the hood; Mercer had been wearing blue denim overalls. Another deputy found "hair-like substances" underneath the car, a towel bearing reddish stains, and a white powdery substance on the car that appeared to be soap powder from a recent car-washing. The officer took scrapings of the blue spot, the hair-like substances, and the white powder and placed these in envelopes. The envelopes, the towel, and certain other articles were brought to the office of the Sheriff of Jefferson Parish and placed in the "evidence locker." This evidence disppeared before the trial and before any of it could be analyzed.

The decedent's wife brought a wrongful death action against Theriot resulting in a jury verdict in her favor for

$25,000. On appeal, this Court, Judge Hutcheson presiding and writing the opinion for the Court, unanimously decided that the judgment should be reversed with directions to enter a verdict for the defendant. *Theriot v. Mercer*, 5 Cir., 1959, 262 F. 2d 75; certiorari denied, 360 U. S. 914 (1959). The Court pointed out that highly prejudicial testimony, which should not have been admitted, and inflammatory trial tactics of the plantiff's attorney had the effect of denying the defendant a fair trial.[1] The Court rested its decision on insufficiency of the evidence to support the verdict: there was a "complete absence of any evidence, circumstantial or otherwise, that Theriot's car struck the deceased or that Theriot was in anywise negligent." 262 F. 2d at 759. Nevertheless, the Court felt that the plaintiff should be given an opportunity to better her presentation of the case by producing additional evidence — if she could — to justify a new trial. The mandate therefore directed the district court

---

[1] "In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominating the trial, deprived the defendant of his day in court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption." (262 F. 2d 754, 758)

"We, therefore, agree with the appellee's statement on page 6 of her brief that, although the defendant denied making a pay-off or giving any political contribution to the sheriff in the sheriff's race that was going on at that time (and nobody gave testimony to the contrary), the jury nevertheless convicted Theriot of making such a pay-off. Indeed it was the admission of *this wholly inadmissible and highly prejudicial hearsay testimony*, the introduction of which should have caused a mistrial, which changed the cause from a suit for damages into an inquisition into fraud and wrong doing in the sheriff's office, a matter which, in the state of the evidence, had nothing to do with the case and could have had no effect on it except the unlawful one of depriving the defendant of a fair trial on the charge of negligence made but not proven." (262 F. 2d at 757)

> ". . . to enter a judgment for the defendant unless plaintiff, within a time and under condition to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot v. Mercer*, 262 F. 2d 754, 761.

In accordance with the mandate, the trial court notified the plaintiff that judgment would be entered for the defendant unless she tendered sufficient evidence to justify submission of the cause to the jury. The plaintiff then filed a "motion for a new trial" and submitted as supporting evidence a report and certain depositions from police officers. The report was a statement from a safety engineer and accident analyst that, in his opinion, the photographs and medical reports demonstrated that the damage to Theriot's car was caused by its impact with Mercer. The depositions showed some skulduggery in the sheriff's office with regard to the missing evidence and indicated also that some of the officers had heard that Theriot had purchased the missing headlight rim from someone who had found it at the scene of the accident. The district court denied the motion for a new trial. "The evidence," a minute entry states, "while persuasive, would be inadmissible in a new trial." Leaning over backwards to be fair, the Court granted a rehearing. On rehearing, the district judge stated from the bench that there was no question in his mind "that there was a denial of justice in this case" and no question in his "mind either that Paris Theriot killed this man," but he felt compelled to deny the motion on the ground that the evidence tendered was not competent, and

that the plaintiff had not met the conditions for a new trial required by the mandate.[2] The plaintiff now appeals from this denial of the motion for a new trial.

On this second appeal the panel to which the case was assigned on its own motion invoked a hearing en banc. The Court en banc affirms the action below and dismisses the appeal.

I.

If the order now appealed from had indeed been an order denying a "motion for a new trial," as the plaintiff termed it, the order would be unappealable. *Soble v. Diatz*, D. C. Cir., 1951, 189 F. 2d 26; *Bass v. B. & O. Terminal Co.*,

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[2]The district court stated:

"[T]he Fifth Circuit ruled that there was not sufficient evidence to support the verdict. And that unless the Plaintiff was able to, on his motion for a new trial, to advance additional evidence which would make out a case for the Jury, the verdict for the Defendant should be granted. And after reviewing the new evidence which the Plaintiff provided, I felt that while the evidence was persuasive and it showed skulduggery in this case, that the sheriff's locker had been rifled and the evidence which was taken from Paris Theriot's car was destroyed so it couldn't be produced in his criminal case or civil case involving this death, there was still no direct evidence. There was just talk among the deputies who were concerned with obtaining the evidence and who, unfortunately, were unable to get the evidence when they went to the locker to get it in order to bring it to the laboratory to have it examined. I felt that the evidence, as produced under the application for new trial, was not competent evidence. In other words, it would have violated the hearsay rule if admitted, and that is the basis on which I denied the application for a new trial.

"It is my view the Fifth Circuit did say that as tried originally there was not sufficient evidence. There is no doubt that it said that unless additional substantial evidence was presented on application for new trial, the verdict should be for the Defendant. That was the basis of my ruling."

7 Cir., 1944, 142 F. 2d 779, cert. den'd 323 U. S. 775. But the motion is not the motion for a new trial contemplated in Fed. R. Civ. P. 59. Such a motion "serve[s] the function of allowing a party to seek to have the trial court correct errors, both of fact and law, that [occur] in the trial of the action." 6 Moore's Federal Practice 59.03 (1961). An order for a new trial reopens the issues of an action for a new trial on the merits, in whole or in part, *before* an appeal on the merits. Here, however, the plaintiff's motion served a different function. It was filed in direct response to the invitation in this Court's mandate that the plaintiff present new evidence. If the plaintiff had made "a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury [would] be offered," the plaintiff would have been entitled to a "judgment for a new trial." Denial of the motion was a final decision by the district court that the plaintiff had failed to meet the terms of the mandate. The Court therefore holds that in the circumstances of this case the denial of the motion was an appealable order.

II.

The argument is made that since the district court entered judgment in compliance with the mandate on the former appeal, the judgment is not appealable. The contention is, that when judgment is entered after a new trial there is no question of jurisdiction to entertain a subsequent appeal; but when there has been no new trial, as in this case, the judgment entered is that of the appellate court itself and there is simply nothing from which to appeal. This rule has been consistently followed in this circuit. See *Davis v. United States*, 5 Cir., 1957, 244 F.

2d 309; *Amalgamated Assn. etc. v. Southern Bus Lines, Inc.*, 5 Cir., 1953, 201 F. 2d 53; *Seagraves v. Wallace*, —, —, — F. 2d —, at 163.

But the appellant is not appealing from a decree that is in effect the decree of the court issuing the mandate. The mandate left open the question of the sufficiency of the additional evidence to support a new trial; the order therefore adjudicated a subsequent issue not determined by the judgment which was the basis for the mandate. The appellant contends that the district court both misconstrued the mandate and was guilty of an abuse of judicial discretion in deciding the issue created by the mandate. An appeal lies, therefore, to review the action of the district court to determine whether it gave effect to the mandate. *In re Sandford Fork & Tool Co.*, 160 U. S. 247, 16 S. Ct. 291, 40 L. Ed. 414; *Metcalf v. City of Watertown*, 1895, 68 Fed. 859; *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 1944, 142 F. 2d 549, *cert. den'd* 320 U. S. 661, 64 S. Ct. 268, 88 L. Ed. 376.

III.

The second appeal does not require a reconsideration of the merits. The narrow questions before the Court en banc are whether the district court properly construed the mandate and whether the district court abused its discretion in holding that the plaintiff failed to meet the terms of the mandate, that is, failed to make a satisfactory showing that the *additional* evidence would justify submission of the case to the jury. Accordingly, it is unnecessary to consider the application of the "law of the case doctrine."

See *Lincoln National Life Insurance Company v. Roosth*, 5 Cir., 1962, — F. 2— 2d.

A. This Court directed that a new trial be granted upon plaintiff's showing evidence of "sufficient probative force to justify submission of the cause to the jury." Instead, the appellant argues, the district judge adopted a different, more stringent requirement. He required that the evidence be "additional" and "direct."

We hold that the district judge properly construed the mandate. The mandate is meaningless unless it refers to "additional" evidence, for the former opinion holds that the evidence in the record was sufficient to support a verdict and judgment for the plaintiff. It is true that the district judge referred to the lack of new "direct" evidence but the basis for his holding was that the evidence offered was hearsay and incompetent, not that it was indirect and circumstantial.

The appellant argues also that a reading of the Court's first opinion shows the chief ground for reversal to have been counsel's inflammatory trial tactics. To overcome this, counsel argues, it is necessary only to have a new trial which, he assures us, can be had in an atmosphere free from all overtones of passion and prejudice. This proposed solution oversimplifies the problem. In its original opinion the Court severely condemned the trial tactics of the plaintiff's counsel and disapproved of the trial judge's admitting certain testimony that was irrelevant and prejudicial, but the court squarely held that the evidence was insufficient to support the verdict. The mandate looked to new probative evidence sufficient to justify a

new trial, not to a new trial on counsel's promise to avoid improper tactics; otherwise, the Court would simply have remanded the case for trial.

B. Coming now to the sufficiency of the additional evidence to justify a new trial, we find ourselves in agreement with the district judge.

In support of his motion for a new trial the defendant offered ten depositions, seven from witnesses who had testified at the trial. Most of this "evidence" related to the missing headlight rim. The depositions show that up and down the bayou there were people who knew people who knew that there was a going price for the missing headlight rim. There were conflicting rumors that Prudhomme had the rim, or Verdun had the rim, or Guidry had the rim, or Nolte Theriot had the rim, and that the defendant had purchased it. But Prudhomme testified that he did not have the rim; someone had told him that Guidry had it and was holding it for $10,000. Guidry said he had heard that Theriot's son had the rim. Verdun denied having found the rim and denied that anybody told him that anyone had found the rim. Nolte Theriot said that he had had nothing to do with the rim. Gilbert Duet testified that a deputy sheriff "just passing through" had told him that he had heard that the rim had been found but he did not say who had found it. The depositions contain testimony of no higher degree of reliability relating to a "report" of a pay-off, presumably by Theriot, to some person (unknown) who destroyed the evidence in the Sheriff's "evidence locker." In short, the additional evidence was hearsay of the rankest sort. It lacked probative force because it was

incompetent, not because it was indirect or circumstantial evidence.

The accident analyst's report adds little support to the plaintiff's cause. It is of doubtful admissibility because it comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative.

The district judge correctly interpreted the mandate and correctly ruled that the additional evidence was of insufficient probative value to justify a new trial. The judgment is

AFFIRMED.

RIVES, Circuit Judge, Dissenting:

In my opinion, the most practical and effective safeguard of liberty and justice is the right of trial by jury. In the words of Patrick Henry, "Trial by jury is the best appendage of freedom."[1] I recognize that there are many eminent lawyers and judges who do not share that view, and that the right of trial by jury is subjected daily to every form of attack, direct and indirect. Such persistent and constant warfare makes it all the more necessary for the defenders of that right to bear in mind that, "Eternal vigilance is the price of liberty."

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[1] 3 Elliotts Debates 324.

Whatever may be our differences of opinion as to the intrinsic merits or demerits of trial by jury, there can be no dissent from the proposition that we are each and all bound by the plain language of the Seventh Amendment, and that language bears repeating:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

With the utmost respect for and deference to the views of my brother judges, it is my duty to express my own considered judgment that this Court's decision both on the original appeal[2] and on this appeal is in direct contravention of the mandate of the Seventh Amendment.

A thorough reading and study of the evidence on the original trial leave me with a clear understanding and approval of the jury's verdict for the plaintiff. I can well appreciate the remark of the learned and experienced trial judge, Honorable J. Skelly Wright, made when he denied the defendant's motion for judgment notwithstanding the verdict: "No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to."

This Court's opinion to the contrary on first appeal

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[2]Theriot v. Mercer, 5 Cir., 1959, 262 F. 2d 754.

did not convince Judge Wright, for in denying the plaintiff's later filed motion for new trial,[3] he said: "There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man."

We deal here with a sorry mess where the evidence which might have established the defendant's guilt or innocence with certainty has been destroyed or irretrievably lost as the result of criminal misconduct on the part of someone. The remaining circumstantial evidence might not sustain a criminal prosecution and conviction of the defendant, but it is, I submit, amply sufficient to support a jury's verdict for the plaintiff in a civil action for damages.

The issues presented to the jury on the first trial, and found in favor of the plaintiff, were thus stated in the court's charge.

> "The issue here is very simple: Did the Defendant, Paris Theriot, kill Byrd Mercer? And, if so, was he guilty of negligence in so doing, which proximately caused that death? That is the sole issue here, whether the Defendant killed Mercer, and if he did, was the death a result of negligence proxi-

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[3]Though immaterial for present purposes, I do not agree with the majority statement that, "If the order now appealed from had indeed been an order denying a 'motion for a new trial,' as the plaintiff termed it, the order would be unappealable." As one of the decisions to the contrary, I note that we reversed an order denying a motion for new trial in Whiteman v. Pitrie, 5 Cir., 1955, 220 F. 2d 914.

mately caused by the Defendant Paris Theriot." (R. 1, p. 282.)[4]

In judging the sufficiency of the evidence to justify or support a verdict for the plaintiff, those issues can be narrowed to one; that is, was there substantial evidence from which the jury could reasonably conclude that the defendant, Paris Theriot, killed Byrd Mercer. That is true because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. *Vick v. United States*, 5 Cir., 1954, 216 F. 2d 228, 233; see *Wong Sun and James Wah Toy v. United States*, U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: "Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver." 61 C.J.S. p. 212, Motor Vehicles, §511 (4).

That the jury could reasonably conclude that a preponderance of the evidence proved that the defendant Paris Theriot killed Byrd Mercer is shown, I submit, by the following catalogue of the evidence. According to the death certificate Byrd Mercer died on Sunday evening, December 18, 1955 at 7:30 p. m. (R. 1, p. 28.) His body was found on the island, Grand Isle, on the right side of the road going toward the bridge leading to the mainland (R. 1, p. 37). The body was two to three feet off the edge of the black top (R. 1, p. 45). Tire marks near his body

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[4]I refer to the record on first trial as R. 1.

ran off the road for quite a way, and his body was right next to the tire marks (R. 1, p. 85). An autopsy revealed evidences of a violent blow. " 'Fractured dislocation of atlantoocipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of skull; rupture of spleen, liver, and both renal arteries; lacerations of scalp, face, right thigh, right hand and left leg.' " (R. 1, pp. 28, 29.)

The road was the only highway leading from Grand Isle to Golden Meadow, the home of the defendant, Paris Theriot (R. 1, p. 61). Theriot had spent that Sunday afternoon at "Fisherman's Bar" on Grand Isle from about 1:00 or 2:00 P. M. to about 7:30 or 7:45 P. M., when he had driven toward Golden Meadow over this same highway (R. 1, pp. 55, 151). During that period Theriot estimated that "I drank between four and five drinks, something like that" of Scotch whiskey (R. 1, p. 56). The bartender's estimate of Theriot's drinks was: "To the best of my knowledge, I would say around eight or ten." (R. 1, p. 152.) That was scaled down from a statement in which he said that he had served Theriot "ten or fifteen Scotch and waters" (R. 1, p. 157).

At the time that Mercer was hit and killed, few people were traveling that highway.[5] Theriot admitted that between Fisherman's Bar and the location where Mercer's body was found he passed only one car, a truck (R. 1, pp. 180, 185). Another explanation for the fact that Mercer's

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[5] "Well, there was, on a Sunday like that, the tourists, but usually they leave early — I mean in the afternoon, so at that time, during the night, there's not too many people, but there was a few people on and off during the afternoon, the people at the bar coming in and out." (R. 1, p. 156.)

body was not found until 6:30 A. M. on December 19th (R. 1, p. 28) is that the weather was rainy and foggy (R. 1, pp. 171, 184).

Suspicion fell on Theriot as soon as Mercer's body was found (R. 1, p. 87), and the officers quickly located Theriot's automobile, a 1955 or 1956 model Oldsmobile (R. 1, p. 88). It bore unmistakable evidence of a recent accident, a blow to the right headlight and right front of the hood extending back to the windshield. On the cream or white colored hood was some blue coloring; "it had an appearance that it could have been done by clothing, since it was porouslike" (R. 1, pp. 108, 230). Mercer was wearing blue coveralls when struck (R. 1, pp. 85, 104). The rim of the headlight was missing (R. 1, p. 102). A medium size bath towel with red stains on it which appeared to be blood (R. 1, p. 116) was found concealed between the seat and the seat cover on the driver's side of the front seat (R. 1, pp. 141, 146). On the chasis underneath the car on the right front side were found hair particles or what looked like hair (R. 1, pp. 40, 46, 93, 122, 140, 160).[6]

When confronted by the officers with the evidence that his automobile had been involved in a recent accident, Theriot readily admitted that that was true, and fixed the time of the accident as noon or 12:15 on the same Sunday on which Mercer was killed (R. 1, pp. 72, 73) and the place as six or seven miles up the bayou from Golden Meadow (R. 1, p. 73). He said that he had tried to pass

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[6] As has been repeatedly said, verification of these findings became impossible when the samples taken by the officers disappeared from the files.

a truck in front of him and "I hit the back of the truck with my right side of the car" (R. 1, p. 73). In Theriot's own language: "I just told you that I was coming, that I was going up the bayou, and I was looking aside when I noticed the truck in front. I tried to pass him on the side, and when I tried to pass him he pulled a little bit on the left, and I hit him right in the back, the piece underneath of the truck body, the body of the truck — it is a 2 or 3x10, or 3x12 sticking out, two pieces like that (indicating with hands), and you've got the body of your truck right on that, and I hit the back part with the top of my headlight, in front, I put my brakes on, and when I saw it, I put the brakes on and I slid on the road and I go off of the road, and I came back slowly, and I just make it. I came back slowly on top, on the road there, and it was gone, I guess, off, and I looked at my car and I saw that it was not too much, and I looked in the back over there and I saw a piece of wood about that long, 26 or 30 inches (indicating with hands) long, and maybe a 6x6 or 6x8, and I threw it on the side of the road, and I turned back and I went right straight to Grand Isle. That's exactly the way that happened." (R. 1, p. 75) See also R. 1, pp. 211, 162, 96. Theriot further testified: "The truck didn't stop — he kept on going. I couldn't check up on it." (R. 1, p. 76.) It seems to me that the probability or improbability of the truthfulness of that explanation presented a question for the jury.

That is especially true in the light of the testimony of Trooper Folse of the Louisiana State Police:

"Q. Isn't it also true that the car tracks of the vehicle, the vehicle tracks that you saw

there did not careen back to the right and get back on the highway?

"A. According to the point where Mr. Theriot brought us, the car, if it swerved over to the left, did not come back to the right any time after it left the highway, if those are the marks.

"Q. In fact, whatever vehicle was in that place where you saw, it had to be pulled out, didn't it?

"A. I would say that if it was soggy and wet, it had to be pulled out.

"Q. You say if it was soggy and wet? Was it?

"A. It was wet." (R. 1, p. 226.)

To Deputy Sheriffs Milliet and Guidry, the defendant Theriot gave an entirely different explanation of the recent accident to his automobile, namely that he had hit a cow (R. 1, pp. 117 and 138).

The defendant Theriot testified that nothing had been done to his car between the time of the accident on Sunday and of its inspection on Monday (R. 1, p. 66). However, the officers found the car covered with a white substance which appeared to be a film of soap left after a washing (R. 1, pp. 109, 116).

Effective December 31, after the accident on December 18, the defendant Theriot sold his business to his brother (R. 1, p. 51).

The circumstances are so numerous that some may have been unintentionally omitted. Those which I have recited,

with references to record pages, seem to me ample to require the submission of this case to the jury.

In *Lincoln National Life Insurance Co. v. Roosth*, 5 Cir., 1962, 306 F. 2d 110, 113, we held that, "when the issue resolves itself, as it does so clearly here, into a question of whether the same body of evidence is enough to permit a jury submission, neither a subsequent, second, or third, panel of this Court, nor the whole Court sitting en banc, should *ordinarily* undertake to review the correctness of the first decision or, doing so, arrive at a contrary conclusion." (Emphasis supplied.) In that case the first decision had reversed a judgment n.o.v. and remanded the case for a new trial. Upon the second appeal we affirmed the judgment entered upon the jury's verdict on new trial. Our added reluctance in that case to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such an inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from *Roosth*. The present case seems to me not an "ordinary" one, not even a "close" case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination.

Assuming, however, that *Roosth* would require us to affirm the judgment of the district court in the absence of additional evidence, surely, with circumstantial evidence already of such weight, very little additional evidence would be needed to meet the requirement of our mandate; that is, that the evidence as a whole be of "sufficient probative force to justify submission of the cause to the

jury." I think that the additional evidence was sufficient to justify a new trial.

It is true that most of the proffered additional testimony was rank hearsay developed in a fruitless effort to trace the lost items of evidence and particularly the rim off the right headlight of the defendant Theriot's Oldsmobile. However, the deposition of a witness not examined on the first trial, Benny Verdun, discloses that he was among the first to reach the body of the deceased shortly after daybreak (p. 21, Verdun's Deposition), and furnishes positive evidence that Mercer was struck and run over by an automobile:

"Q. You just saw the tire marks that ran right off on the shoulder and right on his body and proceeded on down the road?
"A. That's right.
"Q. There was not any question about him being run over by an automobile?
"A. Oh, yes, he was run over by an automobile.
"Q. The evidence showed that?
"A. You could tell it.
"Q. It looked like he was hit in the back and run right over?
"A. Yes, sir.
"Q. And the mark of the tire of the car that did it was plainly visible on his shoulder there?
"A. Yes, sir." (p. 29, Verdun's Deposition.)

A copy of the report of the safety engineer and accident analyst that, in his opinion, the photographs and medical reports demonstrated that the damage to Theriot's car

was caused by its impact with Mercer is attached as Appendix A to this dissenting opinion. On the first trial, the district court had refused to let the law officer witnesses testify as to their opinion of whether the type of indentation on the car was made by a soft or a hard object, on the ground that such testimony was "too speculative" (R. 1, p. 44) or that the witness was not qualified as an expert (R. 1, p. 110, see also R. 1, pp. 90-91). The proffered testimony of the safety engineer and accident analyst was therefore not cumulative. Coming from an expert, that testimony, or most of it, was admissible.

> "A large class of cases, embracing statements as to the *probability* or the possibility of an event, the *capacity* or tendency of an act or a machine, the *cause* or the *effect* of a fact, may fairly be grouped together, because the reason why the Opinion rule is urged against them is in general that the thing to which the witness testifies is not anything which he has observed, but is a quantity which lies in estimate only and is the result of a balancing of concrete data.
>
> "This is no sufficient reason for excluding such statements from qualified witnesses; because it must almost always be impossible for a witness to reproduce in words absolutely all the detailed data which enter into his estimate, and there can be no danger in receiving such an estimate from him. All that can be said of the rulings is that probably some of them, in the final result of the litigation in hand, have done less actual harm to justice than others have done."

VII Wigmore on Evidence, 3rd ed., § 1976, p. 121.

To repeat, if any evidence were needed to weight the scales in favor of sufficiency to justify submission of the issues to the jury, such evidence need be very slight. In my opinion, the deposition of Benny Verdun and the testimony of the safety engineer and accident analyst are enough.

I would accord the plaintiff what I believe to be her constitutional right to a trial by jury, and therefore respectfully dissent.

APPENDIX A

ACCIDENT ANALYSIS LABORATORY
Eight-Eleven North Virginia
Oklahoma City 6, Oklahoma
May 16, 1959

Ralph H. Snyder

Phone CEntral 2-1830
Post Office Box 3855

Mr. H. Alva Brumfield
Attorney at Law
205 American Bank Building
Baton Rouge, Louisiana

Re: Mercer vs. Theriot

Dear Mr. Brumfield:

I have made a very careful study and analysis of this case, based on the physical evidence as shown in the

photographs of the damaged Oldsmobile automobile, the post mortem report showing the injuries to the deceased and the photographs taken at the scene of the accident before the deceased was removed.

As I understand this case, the main issue is whether or not the damage to the Olds. automobile was caused by collision with the rear of a flat bed truck, or hitting the pedestrian.

A very minute examination of the damage to the Olds. discloses the following facts:

1. The initial blow or force which caused the downward bend in the right front headlamp, came from the front and slightly to the right. Due to the top overhang of the headlamp rim, the top portion of the headlamp received most of the blow. This caused the headlamp assembly to tilt upward and backward, yet there is no visable (sic) dents or damage to the black plate rim around the headlamp and also the lens.

2. The two inward dents in the right side of the fender located above the right front wheel were caused by the blow or force coming from the front and not from any side blow.

3. The damage to the hood and fender located on the top right side and back toward the windshield, were caused by a blow coming from above, and an object large enough to cover the damaged area. The indentation in the hood was enough to bend up the corner of the hood approx. 1/2 inch.

4. While there appears to be colored streaks extending along the top of the fender from the damaged area backwards, there is no indication of scratches or indentations between the front and rear damaged areas.

5. An examination of the ridge of the right front bumper where it bends to the rear shows that this edge came into contact with some object which cleaned or wiped off the road grime and dirt. This is very evident when the photos are examined under a high power magnifying lens.

It is my understanding that the defendant claims that the car was damaged when he started around a flat bed truck and as he started around, the truck started to make a left turn or to swing to its left and the right front fender struck the left rear supporting joint of the truck. And that the blow was of enough force for a piece of wood (3" x 6"x30") (approximate) to be knocked off the truck (I believe it was supposed to have been laying loose on the bed of the truck and not a portion of the truck bed or support) and that it was this piece of wood which came down on the rear of the hood and fender to cause the damage in that area.

I can find no mention made regarding the finding of the chromium headlamp rim. The type and extent of damage to this rim would be one of the most important bits of evidence, as it would clearly show the fact of the hardness of the object hit. The contact damage against the wood or metal of the truck bed would be entirely different than the damage made by striking a human or an animal.

ANALYSIS AND CONCLUSIONS: All of the physical evidence relative to the damage to the Olds. indicates that for this damage to have been caused by collision with the rear of a truck as described by the defendant would not be possible.

1. While it is possible for the damage to the fender just behind the headlamp to be caused by the car running into the joist on the truck, the amount of force necessary to bend the fender to the extent shown in the photos and also cause the fender to bend on the side area above the front wheel, the striking force against the truck joist by the headlamp rim would extend through the light chromium rim and would also bend the back plate. The back plate shows no bends. It would also break the headlamp glass. The glass is not broken.

2. The blue streaks extending back along the top of the fender and also found in the area of the dented area at the rear of the hood could only get there if the truck had scraped the top of the fender by the fender going on e neath the truck to the left of the joist. The fender top shows no scraping or denting, just a discoloration. This could not be possible if the fender went under the truck bed. The height of all truck beds (even the large trailer units) are too low to permit the front of an automobile to go underneath without beinding and scraping. On most trucks the height is 2 to 3 inches lower.

3. If the front right fender hit the truck joist and slid under, then there would be damage to the right side of the fender caused by further contact with the joist, which

is approx. 6 in. in height and extends below the truck bed for that distance.

4. The damaged area at the rear of the hood extends from the metal ridge which extends from the front ornament back to the edge of the hood, and also several inches into the top of the fender. This damage could not have been caused by the initial impact with the front of the fender striking the truck (the front of the hood shows no impact damage), nor could it have been caused by the piece of wood, as described by the defendant, being knocked from the truck, going up into the air and coming down on the hood and fender. In the first place the impact force would not be of enough weight and would not have enough force to bend the hood and fender to the depth, width, and extent as shown in the photographs.

5. The "cleaned" area along the ridge of the front bumper could be explained as being caused by contact with the wheel flap or even the left rear wheel of the truck as the car came underneath the bed. Again, this would not be possible as the bumper would have to penetrate at least a foot or so underneath the truck bed for the bumper to contact the wheel and this would leave damage to the top of the fender, which is not present.

6. The physical damage to this car could not have been caused by collision with the rear of a truck such as described by the defendant.

In my opinion, this damage was caused by striking the pedestrian.

1. The "cleaned" area on the edge of the right front bumper was caused when the bumper struck the man's left leg. His tibia and fibula were fractured and if he was walking with his back to the car this would be the first striking point.

2. The damage to the headlamp rim and fender was caused when the car struck this man in the back. His post mortem report shows a ruptured spleen, renal arteries, etc., which would be the area struck by the headlamp and fender.

3. The area of damage at the rear of the hood was caused by the head and shoulders of the man striking as his body was flipped upward and backward. It would require the weight and force of an adult to bend the hood and fender to the width and depth if (sic) was bent.

4. None of the photographs are clear enough nor taken close enough for me to determine the type of discoloration left along the top of the fender and hood. From the description of the investigating officers' report, they described it as being "blue in color and of a porous texture, like made from a cloth." Such a discoloration could not be made by contact with the truck but could be from contact with the clothes of the deceased.

5. Mention is made of finding what appeared to be "human hairs" caught in the steering arm underneath the car. I do not give any weight to the fact that these would be hairs from the deceased, as there is no evidence that the car passed over his body. The body shows no tire marks and if the body was hit, thrown up and backward, striking

at the back of the hood and then off the car, the front of the car would not have passed over his body unless the driver backed over the body or turned around and drove over the body. This is most unlikely.

6. Other factors which are difficult to understand if the truck was hit by this car is why, with this amount of damage, would the defendant drive off without getting the truck driver's name and the license number for either trying to collect from the truck's insurance carrier or his own for repairs. Also, no mention was made of bringing in the piece of wood for evidence, nor if it was also blue in color. Where did the headlamp rim go?

In making this analysis I have to be as unbiased as possible in reaching my conclusions. However, the physical evidence is so clearly definite in proof that the damage to the Olds. automobile could not have been made by contact with the rear of a truck as described by the defendant, it leaves no recourse but to find that the damage could have been caused by striking a pedestrian and that it is most likely that this is the car which struck the deceased.

Very truly yours,

(Signed) RALPH SNYDER
Ralph H. Snyder
Safety Engineer & Accident Analyst.

RHS:ms
Encls:
13 photos

BROWN, Circuit Judge, Dissenting:

The question for review is whether, on the proceedings pursuant to our remand, the evidence of the total record was sufficient to raise a jury question. This is so because it was implicit in our remand that the District Judge was to consider not only whatever additional showing was made, but to consider it in the light of and as a part of the total record. If the evidence was sufficient to raise a jury question, then it was incumbent on the District Judge to grant a new trial. We did not mean to accord to the District Judge any discretion in determining that legal question. *Whiteman v. Pitrie*, 5 Cir., 1955, 220 F. 2d 914; *Kirby Lumber Corporation v. Laird*, 5 Cir., 1956, 231 F. 2d 812, 816. For all of the reasons so ably set forth by Judge Rives, the evidence was more than ample to compel a jury trial as a matter of law. Because of the unique nature of our remand, we are not on this appeal now faced with the *Roosth* problem or the desirability (or necessity) of modifying it.

GEWIN, Circuit Judge, Dissenting:

Believing that there is sufficient evidence to require a submission of the factual issues in this case to a jury for decision, I join in the dissent of Judge Rives.

BELL, Circuit Judge, Dissenting:

I join in the dissent of Judge Rives with the following additional statement. My view in this case, as in *Lincoln National Life Insurance Company v. Roosth*, 5 Cir., 1962, 306 F. 2d 110, is based on the sufficiency of the evidence. I feel that the evidence, at least on the second hearing of this case was sufficient to make a jury issue. I felt that the evidence was insufficient in *Lincoln National*. The losing party there, as must be implicit here, suffered the misfortune of being caught up in the law of the case doctrine. But here that doctrine should play no part as there was sufficient additional evidence over what was presented on the first trial to take the case to the jury.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1963

No. 336

MRS. WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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IN THE

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ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

When this case was tried to a jury, resulting in a verdict for petitioner, the district Court entered judgment in accordance therewith, without written opinion. The opinion of the United States Court of Appeals for the

Fifth Circuit, reversing the jury verdict, with directions to enter a judgment for defendant unless petitioner made a satisfactory showing that on another trial evidence of sufficient probative force warranting submission of the cause to the jury would be offered, in which case the judgment would be for a new trial, is reported at 262 F. (2d) 754 (5th Cir. 1959), certiorari denied, 360 U. S. 914 (1959). The opinion of the district Court (R. p. 230) refused to grant petitioner a new trial on the grounds that the additional evidence she submitted, ". . . while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. p. 230.) The opinion of five judges of the United States Court of Appeals for the Fifth Circuit, sitting *en banc* (R. pp. 247-254), affirmed the holding of the district Court; four judges dissented, assigning written reasons (R. pp. 254-269.) The decision is reported at 316 F. (2d) 635.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in *Mercer v. Theriot* (No. 19,068), was entered on March 14, 1963 (R. p. 270), and the order denying petitioner's petition for rehearing was entered on May 9, 1963 (R. pp. 270-271). This Court has jurisdiction under 28 U. S. C., § 1254. Certiorari was granted on November 18, 1963 (R. p. 271), 84 Sup. Ct. 264.

STATUTES INVOLVED.

1. *U. S. Constitution*, Amendment VII.
2. *Federal Rules of Civil Procedure* 43(a).

QUESTIONS PRESENTED.

1. Whether the United States Court of Appeals for the Fifth Circuit can re-examine facts found by a jury and substitute its findings for those of the jury.

2. Whether the United States Court of Appeals for the Fifth Circuit is empowered to withhold a cause from the jury when evidence has been presented from which reasonable men could draw different conclusions and inferences.

3. Whether or not evidence presented by petitioner was incompetent.

4. Whether or not the opinion of an expert witness usurps the jury's function of finding ultimate facts and is thus inadmissible.

STATEMENT.

Petitioner, Wanda Lane Mercer, and Byrd Mercer were married on May 5, 1948, and continued to reside as husband and wife up to the time of his death on December 18, 1955. (R. p. 113.) Byrd Mercer was then employed in construction work, laying a pipeline in the Gulf of Mexico, and was living with petitioner in a trailer court on Grand Isle, in the State of Louisiana, approximately four miles east of the docks where Mercer caught the boat which transported him to the job. (R. pp. 109-110.)

After arriving at the dock after work on the evening of December 18, 1955, Mercer did not ride home

with his coworkers as he customarily did (R. p. 111); he was last seen alive at approximately 7 P. M. (R. p. 111.)

Paris Theriot, the respondent, had homes in Golden Meadow, Louisiana, as well as on Grand Isle (R. p. 33), and in December of 1955 was living in his Golden Meadow home (R. p. 33). Theriot, in partnership with his brother, Leo Theriot, owned an automobile agency selling Oldsmobiles and Chevrolets. Theriot went to Grand Isle on Sunday, December 18, 1955, for the stated purpose of selling an Oldsmobile to Leo Terrebonne (R. p. 37); respondent was driving a 1955 Oldsmobile, painted white in front and red in back (R. p. 34). Theriot made a deal with Leo Terrebonne to sell him an automobile, and then went to a tavern known as Fisherman's Bar in Grand Isle. (R. p. 38.) He admitted consuming four or five drinks of Scotch and water (R. p. 38), but the bartender, Louis Bradberry, stated he served Theriot ten or fifteen Scotch and water drinks (R. p. 102).

About 7:30 P. M. respondent left Grand Isle to return to his home in Golden Meadow, traveling over Louisiana Highway 1, which is the only road on Grand Isle, going in an easterly direction. (R. p. 41.) At that time a drizzling rain was falling, and there was some fog. (R. pp. 42, 120.)

Around 7 or 7:30 A. M., on Monday, December 19, 1955, petitioner was informed that her husband had been found dead on the right shoulder of Highway 1, on Grand Isle. (R. p. 114.) The coroner's certificate, introduced in evidence, marked Plaintiff's Exhibit 2, shows that Mercer died on Grand Isle Road No. 1 about

7:30 P. M. December 18, near the Humble Oil Camp, and was thirty-two years of age, white; the final diagnosis as shown on the autopsy report of the pathologist, all as shown on Plaintiff's Exhibits 3, 3-A, 3-B and 4, indicated that the deceased died from fracture dislocation of the antlantooccipital joint with traumatic contusion of spinal cord; comminuted fracture of left tibia and fibula; partial separation of lambdoid suture of the skull; rupture of the spleen, liver and both renal arteries, laceration of scalp, face, right thigh, right hand and left leg. (R. pp. 20-21.)

At approximately 10 A. M. on December 19, 1955, Deputy Sheriff Gautreau, in charge of the investigation of this death (R. p. 27), took photographs of the scene. The body was still in the position in which it had been found (R. p. 22), on the right side of the road going in the direction of the bridge connecting the island with the mainland. (R. pp. 26, 56.) Decedent's body was some two to three feet off the edge of the pavement (R. pp. 31, 144), right next to the tire marks which ran off the road quite a way (R. p. 56). A spot of blood was observed by Officer Folse, in what appeared to be an automobile tire track, about three feet from the asphalt portion of the highway. (R. p. 144.) Mercer was wearing blue denim work clothes; his lunch pail was also found at the side of the road. (R. p. 56.)

The investigating officers proceeded to Golden Meadow, where they gave Theriot's car a careful examination. (R. pp. 27, 60, 61, 79.) Deputy Sheriff Gautreau made six pictures of the automobile, introduced in evidence and marked for identification as Gautreau 8-13.

(R. p. 25.) These photographs, together with the testimony of the officers, revealed that Theriot's car was damaged; the right front fender was dented, the rim of the headlight missing, and there was a large indentation on the hood of the automobile. (R. p. 59.) Scrapings were taken by these officers of a blue colored spot, which appeared to be a dye stain; a white substance, taken from the indented section, which appeared to be soap powder left on the surface of the car (R. pp. 60, 75); as well as a hair-like substance taken from the right front axle (R. pp. 61, 75, 79). Former Deputy Sheriff Guidry found a towel in the car, between the back seat and the seat cover, bearing dark brownish spots appearing to be blood. (R. pp. 80, 81, 92.) This evidence, along with the lunch pail, clothing and other articles, was brought to the sheriff's office, whence they were to be sent to the Department of Public Safety's laboratory in Baton Rouge. (R. pp. 61, 68.)

Deputy Prudhomme requested permission to bring this evidence to Baton Rouge, but was refused. (R. p. 69.) The evidence, along with Prudhomme's notes, was found to have been tampered with, and then subsequently disappeared. (R. p. 62.) Several inquiries were made by Deputy Milliet and Officer Folse regarding the disappearance of the evidence, all to no avail. (R. pp. 77, 149.) Trooper Folse said that this evidence and the investigation made would furnish definite proof as to the identity of the driver responsible for Mercer's death (R. p. 148), and further testified without objection that he heard there had been a payoff in the case. (R. pp. 149-150.) Deputy Sheriff Milliet testified that he had been fired as a result of the case. (R. p. 88.)

Paris Theriot gave conflicting explanations as to the cause of the damage to his automobile. He told Deputy Milliet and former Deputy Guidry that he had hit a cow with his car the day before. (R. pp. 76, 92.) He also told Trooper Folse and Deputy Prudhomme that he had collided with a truck which was proceeding in the same direction in which he was going. After the impact, he stated that he ran off the road for some 150-200 feet, and then pulled back onto the road. (R. p. 137.) The officers investigating the side of the highway saw no such markings. Trooper Folse testified that there was some evidence that a car had run off the highway, but at that particular location the mud was so thick and wet that the only way the vehicle could have gotten back on the road was for it to have been pulled out. (R. p. 147.)

It was shown that Paris Theriot sold his interest in the automobile agency business to his brother, effective December 31, 1955, less than two weeks after this accident. (R. p. 37.) In addition, Theriot endorsed a note for one of his witnesses, Leo Terrebonne, in the amount of $20,000.00. (R. p. 161.) Under Rules 43(b) of the Federal Rules of Civil Procedure, the deposition of the defendant was offered in evidence out of the presence of the jury. The deposition shows that Theriot admitted running over two other individuals. (R. p. 166.) This evidence was ruled inadmissible by the trial judge, who stated that if such evidence came out, even without any prompting from any witness, the Court would immediately order a mistrial. The excluded evidence was then admitted for the record. (R. p. 167.)

PROCEEDINGS BELOW.

The jury returned a verdict for petitioner in the amount of $25,000.00, and judgment was entered on October 29, 1957, in conformity with the verdict. (R. p. 195.) In denying defendant's motion for judgment notwithstanding the verdict and motion for new trial, the district Court gave as its reasons the following: "No one who sat through this trial and heard the witness could reasonably come to any conclusion except the one the jury came to." (R. p. 197.)

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the district Court and remanded the case with directions to enter a verdict for the defendant, "* * * unless plaintiff, within a time and under conditions to be fixed by the district judge, make a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." *Theriot v. Mercer*, 262 F. (2d) 754, 761 (1959).

In response to the appellate Court's mandate, petitioner presented the following evidence: a report by Dr. Ralph Snyder, safety engineer and accident analyst, made after a study of photographs of the defendant's damaged automobile, and ten depositions. The district Court denied petitioner's motion for a new trial for the reason that such evidence ". . . while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. p. 230.) Granting petitioner's motion for rehearing, the district Court observed: "There isn't any question in my

mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man." (R. p. 236.)

Following petitioner's appeal, the United States Court of Appeals for the Fifth Circuit, *en banc*, with four judges dissenting, affirmed the lower Court's judgment. (R. pp. 247-269.)

SUMMARY OF ARGUMENT.

1. Under the Seventh Amendment to the Constitution of the United States, it is the function of the jury to find facts; once such a finding of fact is made, it cannot be re-examined by any Court. On the first appeal of this case the Court of Appeals redetermined facts and reversed a jury verdict for petitioner in contravention of this constitutional guarantee.

   Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U. S. 355 (1962).

2. In addition to re-examining the facts found by the jury, the appellate Court held that the evidence was insufficient to support the verdict, despite the existence of a preponderance of competent, probative evidence adduced by petitioner.

   Dick v. New York Life Insurance Company, 359 U. S. 437 (1959).

3. On the second appeal of this case, the Court of Appeals held that evidence presented by petitioner in an effort to obtain a new trial following the reversal of the jury verdict, did not justify submission of

the cause to the jury. While the evidence was circumstantial, it established that facts were in dispute, warranting a resolution of such factual questions by the jury.

Schulz v. Pennsylvania Railroad Company, 350 U. S. 523 (1956);

Byrd v. Blue Ridge Rural Electrical Cooperative, Inc., 356 U. S. 525 (1956).

ARGUMENT.

I.

In Re-examining Facts Found by the Jury, and Reversing the Jury's Verdict, the United States Court of Appeals for the Fifth Circuit Violated the Mandate of the Seventh Amendment.

As Judge Rives observed in his dissenting opinion herein, ". . . the most practical and effective safeguard of liberty and justice is the right of trial by jury." (R. p. 254.)[1] To secure this right, the Seventh Amendment to the United States Constitution was enacted, specifically forbidding judicial re-examination of facts "tried to a jury."[2] Without such a prohibition, a jury trial can have

[1] In **Parsons v. Bedford, Breedlove & Robeson**, 21 U. S. (8 Pet.) 433 (1830), this Court declared:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every State constitution in the Union; and it is found in the constitution of Louisiana."

[2] "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court in the United States, than according to the rules of the common law." U. S. Const. amend. VII.

no binding force, and the jury's deliberations have no significance.

Stemming the tide of resistance to the sanctity of the jury verdict, this Court, in countless decisions, has demonstrated an unyielding commitment to the constitutional guarantee embodied in the Seventh Amendment, which it has zealously enforced by the granting of certiorari and the reinstatement of jury verdicts overturned by state and federal courts.[3] Illustrative of these decisions is *Atlantic and Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U. S. 355, 358-359 (1962), in which this Court distinguished the function of the jury from that of the appellate Court as follows:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than a District Court can predetermine them."

The impropriety of reversals of jury findings in cases involving recovery under the Federal Employers' Liability Act, 45 U. S. C., §§ 51, *et seq.*, has claimed this Court's attention on three recent occasions. *Basham v. Pennsylvania Railroad Company*, 372 U. S. 699 (1963); *Harrison v. Missouri Pacific Railroad Co.*, 372 U. S. 248 (1963); *Gallick v. Baltimore & Ohio Railroad Co.*, 372

[3] See Annot., **The Supreme Court's Review of Sufficiency of Evidence in Actions Under the Federal Employer's Liability Act**, 4 L. Ed. (2d) 1787 (1959), and the dissenting opinion of Judge Clark, Chief Judge of the Court of Appeals for the Second Circuit, in **Filipek v. Moore-McCormack Lines**, 258 F. (2d) 734 (2d Cir. 1958), in which over twenty cases are cited as examples in which this Court granted certiorari in order to restore jury verdicts.

U. S. 108 (1963). In all of these decisions, it was found that the invasion of the jury's province of fact finding was unwarranted. In the *Gallick* case, petitioner sustained injury resulting from a bite of an insect allegedly attracted to a fetid pool allowed to remain near the work site by respondent. The Court of Appeals for the state of Ohio found the evidence insufficient with respect to the causal connection between the railroad's negligence and the insect bite, and overturned petitioner's jury verdict. This judgment was reversed by this Court, relying on the rule of *Tennant v. Peoria & P. U. R. Co.*, 321 U. S. 29 (1944),[4] to the effect that appellate courts should not search the record in an attempt to find conflicts in the evidence, and thereafter take the case from the jury.[5] Moreover, the Court of Appeals' finding that direct evidence was needed concerning the origin of the offending insect in the pool was held to be erroneous.

Petitioner urges that in the case at bar the United States Court of Appeals for the Fifth Circuit likewise was not empowered to re-examine facts previously found by the jury. In light of the well-established jurisprudence denying this capacity to an appellate Court,[6] it is submitted that the judgments below should be reversed.

[4] The applicability of **Tennant v. Peoria** to cases other than those arising under the Federal Employer's Liability Act is evidenced by citation of this case as authority for the amount of evidence needed to present a jury question in a suit under the Clayton Act, cited below, **Continental Co. v. Union Carbide**, 370 U. S. 690 (1962).

[5] This principle is cited with approval by the Court of Appeals for the Fifth Circuit in **Great American Insurance Company v. Cutrer**, 298 F. (2d) 79 (5th Cir. 1962).

[6] Decisions holding that facts found by a jury cannot be reweighed are these: **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500 (1957);

(Footnote continued on next page)

II.

The United States Court of Appeals for the Fifth Circuit Erred in Finding the Evidence Was Insufficient to Support the Jury Verdict.

On the first appeal of the instant case the United States Court of Appeals for the Fifth Circuit held that the evidence was not sufficient to support the jury verdict, or to justify submission of the cause to the jury, and, accordingly, the judgment was reversed, *Theriot v. Mercer*, 262 F. (2d) 754, 759 (5th Cir. 1959). While it is true that no eyewitness to the accident could be produced by petitioner, it is manifest that such evidence is not required. Further, the record reveals ample evidence from which the jury could draw inferences of respondent's negligence, proximately causing the death of petitioner's decedent. This evidence was not only convincing to the jury but to the trial judge and four judges of the Fifth Circuit Court of Appeals as well.

A similar finding of insufficiency of evidence to support a jury verdict was reversed by this Court in *Dick v. New York Life Insurance Company*, 359 U. S. 437 (1959). In that case the jury found the insured had met his death accidentally, and did not take his own life;

Ellis v. Union Pac. R. Co., 329 U. S. 649 (1947); **Lavendar v. Kurn**, 327 U. S. 645 (1946); **Eastman Kodak Company of New York v. Southern Photo Materials Company**, 273 U. S. 359 (1927); **Panama R. Company v. Bosse**, 249 U. S. 41 (1919); **Jefferson v. Taiyo Katun, K. K.**, 310 F. (2d) 582 (5th Cir. 1962); **State Farm Mutual Automobile Insurance Co. v. Canzoneri**, 297 F. (2d) 369 (5th Cir. 1961); **Johnson v. Hill**, 247 F. (2d) 110 (8th Cir. 1960); **Readnaur v. Commercial Standard Insurance Company**, 253 F. (2d) 907 (10 Cir. 1958); **Greyhound Corporation v. Dewey**, 240 F. (2d) 899 (5th Cir. 1957); **General Accident Fire & Life Assurance Corp. v. Zapel**, 231 F. (2d) 917 (5th Cir. 1956).

hence, the insurer was liable to petitioner as beneficiary under policies of insurance for double indemnity payments. Motions for directed verdict and judgment notwithstanding the verdict filed by the insurance company were denied by the trial judge. The Court of Appeals reversed, and dismissed the complaint, asserting that it was unable to believe that the decedent, an experienced hunter, could have possibly shot himself by accident, first by one barrel and then the other. Therefore, the question of whether the death was an accident was not a question of fact for the jury and should not have been submitted.

Summarizing the evidence, all of which was circumstantial, this Court held that the accidental discharge of the gun on another occasion, testified to by one of petitioner's witnesses, together with facts tending to show suicide had not been contemplated by the insured, supported the verdict, which must be reinstated. The error of the Court of Appeals was described in the following manner:

> "In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score could support a jury conclusion that the gun might have fired accidentally from other causes."
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> * * * * * * *
>
> "After all the evidence was in, the district judge, who was intimately concerned with the trial and

> who has a first hand knowledge of the applicable state principles, believed the case should go to the jury."
>
> *Dick v. New York Life Insurance Company*, 359 U. S. at pp. 445-446.

Comparable holdings of this Court on this issue may be found in *Dennis v. The Denver & Rio Grande Western Railroad Co.*, 84 Sup. Ct. 291 (1963); *Michalic v. Cleveland Tankers, Inc.*, 364 U. S. 325 (1960); *Sentilles v. Inter-Caribbean Shipping Corporation*, 361 U. S. 107 (1959); *Harris v. Pennsylvania Railroad Co.*, 361 U. S. 15 (1959).

In both the *Dick* decision and the case at bar, the evidence, circumstantial in nature, owing to the fact the deaths were unwitnessed, satisfied the district judge as well as the jury. Judge Skelly Wright's reasons for judgment following the trial reflect this conviction: "No one who sat through this trial and heard the witnesses could reasonably come to any conclusion except the one the jury came to." (R. p. 197.) It should be noted that subsequent to the reversal of the judgment by the United States Court of Appeals, Judge Wright's opinion was unchanged, as disclosed by this statement:

> "There isn't any question in my mind that there was a denial of justice in this case. There isn't any question in my mind either that Paris Theriot killed this man." (R. p. 236.)

In complete agreement with Judge Wright's opinion, Judge Rives, in his dissent, expressed his views as follows:

"In judging the sufficiency of the evidence to justify or support a verdict for the plaintiff, those issues can be narrowed to one: that is, was there substantial evidence from which the jury could reasonably conclude that the defendant, Paris Theriot, killed Byrd Mercer. This is true because the circumstantial evidence was overwhelming that Byrd Mercer was killed by some hit-and-run driver. Flight is evidence of guilt even in a criminal case, albeit the circumstances may be such as to make it weak evidence. Vick v. United States, 5 Cir., 1954, 216 F. (2d) 228, 233; see Wong Sun and James Wah Toy v. United States, U. S. October Term 1962, No. 36, decided Jan. 14, 1963, m/s, footnote 10. In civil cases of this type, the rule has been well expressed as follows: 'Every legitimate inference will be drawn against a hit-and-run driver, and an inference of an admission of negligence has been drawn against such a driver.' 61 C.J.S., p. 212, Motor Vehicles, § 511 (4).

"That the jury could reasonably conclude that a preponderance of the evidence proved that the defendant Paris Theriot killed Byrd Mercer, is shown, I submit, by the following catalogue of evidence. . . ." (R. pp. 256-257.)

Petitioner submits that the district judge and the four dissenting judges of the Court of Appeals were eminently correct; thus, the judgment of the majority of the appellate Court should be reversed.

III.

The United States Court of Appeals for the Fifth Circuit Erred in Finding Petitioner's Evidence Insufficient to Warrant Submission of the Case to the Jury.

In its opinion, the Court of Appeals, on the first appeal, held that there was a complete absence of any evidence of defendant's negligence (R. p. 249) and that "The second appeal does not require a reconsideration of the merits." (R. p. 252.) With respect to the evidence offered by petitioner in the district Court, pursuant to the mandate of the Court of Appeals, it was held that the evidence contained in the depositions, ". . . lacked probative force because it was incompetent, not because it was indirect or circumstantial evidence." (R. p. 254.) With respect to the accident analyst's report, the Court observed: "It is of doubtful admissibility because it comes close to taking over the jury's function of deciding ultimate facts. At best the report is merely cumulative." (R. p. 254.)

It is petitioner's position that the Court erroneously held that it was required to abide by its original decision that there was total absence of probative facts.[1]

[1] In regard to the possibility that the Court of Appeals' first decision constituted the law on the case, preventing an appellate court ordinarily from reviewing the correctness and arriving at a contrary conclusion on the question of whether the same body of evidence is sufficient to permit jury submission, **Lincoln National Life Insurance Co. v. Roosth**, 306 F. (2d) 110, 113 (5th Cir. 1962), Judge Rives' dissenting opinion points out relative to the **Roosth** case:

"In that case the first decision had reversed a judgment n. o. v. and remanded the case for a new trial. Upon the second appeal we affirm the judgment entered upon the

(Footnote continued on next page)

and, further, that the evidence presented by petitioner in response to the mandate presented a submissible case according to the decisions of this Court and other Courts of Appeal, including those of the Fifth Circuit.

The rule with respect to the determination of the presence of a jury question has been defined by this Court in *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, 67-68 (1943), as follows:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, etc., R. Co., 128 U. S. 443, 445, 9 S. Ct. 118, 32 L. Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-

jury's verdict on new trial. Our added reluctance to depart from the law of the case was, therefore, not inconsistent with the mandate of the Seventh Amendment. There is such inconsistency in the present case, and the constitutional mandate should prevail. In addition, I have emphasized the word "ordinarily" in the quotation from Roosth. The present case seems to me not an 'ordinary' one, not even a 'close' case, but one where the circumstantial evidence very clearly requires a submission of the issues for the jury's determination." (R. pp. 260-261).

Examples of reconsideration and reversals of former holdings are **Cochran v. M & M Transp. Co.**, 110 F. (2d) 519 (1st Cir. 1940), and **In Re Allied Electric Products, Inc.**, 194 F. Supp. 26 (D. C. N. J. 1961)

minded men may draw different inferences,' the case should go to the jury."[8]

A more recent statement of this principle appears in *Continental Co. v. Union Carbide*, 370 U. S. 690, 700-701 (1962), involving a suit by petitioner under § 4 of the Clayton Act, 15 U. S. C., § 15:

> "Undoubtedly all of the evidence during this period does not point in one direction and different inferences might reasonably be drawn from it. There was, however, sufficient evidence to go to the jury which 'weighs the contradictory evidence and inferences' and draws 'the ultimate conclusions as to the facts.' Tennant v. Peoria & P. U. R. Co., 321 U. S. 29, 35."

This Court, in *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523 (1956), applied this doctrine to a case consisting entirely of circumstantial evidence. Petitioner sued for the wrongful death of her husband, who

[8] To the same effect are these decisions: **Davis v. Virginian Railway Co.**, 361 U. S. 354 (1960); **Conner v. Butler**, 361 U. S. 29 (1959); **Magenau v. Aetna Freight Lines, Inc.**, 360 U. S. 308 (1959); **Baker v. Texas & Pacific Railway Co.**, 359 U. S. 227 (1959); **Berry v. United States**, 312 U. S. 450 (1941); **Texas & Pacific Railway Company v. Harvey**, 228 U. S. 319 (1913); **Kreigh v. Westinghouse Co.**, 214 U. S. 249 (1909); **Gardner v. Michigan Central Railroad**, 150 U. S. 349 (1893); **McQueen v. Navajo Freight Lines, Inc.**, 293 F. (2d) 530 (8th Cir. 1961); **Dickerson v. Shepard Warner Elevator Co.**, 287 F. (2d) 255 (6th Cir., 1961); **Williams v. National Surety Corporation**, 257 F. (2d) 771 (5th Cir. 1958); **Central Truck Lines, Inc., v. Lott**, 249 F. (2d) 722 (5th Cir. 1957); **Greyhound Corporation v. Dewey**, 240 F. (2d) 889 (5th Cir. 1957); **Western Production Company v. Yarbrough**, 234 F. (2d) 889 (5th Cir. 1956); **Roundtree v. Post**, 134 F. (2d) 340 (5th Cir. 1943); **James, Sufficiency of the Evidence and Jury Control Devices Available Before Verdict**, 47 Va. L. Rev. 218 (1961).

had been employed by respondent as a tug fireman. He was last seen at 1:25 A. M. walking in the direction of a tug, and several weeks later his body was discovered in the water near an adjacent pier; he had drowned, and there were no witnesses who could testify as to the attendant facts. It was shown that the decedent had to take care of four tugs by himself, and was obliged to step from one boat to another with no illumination except his flashlight. The district Court ordered the jury to return a verdict for defendant, since the only things that had been established were an accidental death and some evidence of negligence, but "not a shred of evidence connecting the two." The Court of Appeals affirmed, with the comment that while the evidence was "perhaps at most only doubtfully sufficient to present a jury question as to the defendant's breach of duty," it failed to show "where the accident occurred," or "that it was proximately caused by any default on the part of the defendant." This Court granted certiorari and reversed for these reasons:

> "In this case petitioner is entitled to recover if her husband's death resulted 'in whole or in part' from defendant's negligence. Fair-minded men could certainly find from the foregoing facts that defendant was negligent in requiring Schulz to work on these dark, icy and undermanned boats. And reasonable men could also find from the discovery of Schulz's half-robed body with a flashlight gripped in his hand that he slipped from an unlighted tug as he groped about in the darkness attempting to perform his duties. But the courts below took this case from the jury because of a

possibility that Schulz might have fallen on a particular spot where there happened to be no ice, or that he might have fallen from the one boat that was partially illuminated by shore lights. Doubtless the jury could have so found had the court allowed it to perform its function, but it would not have been compelled to draw such inferences. For 'The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Fact finding does not require mathematical certainty. Jurors are supposed to reach their conclusions on the basis of common sense, common understanding and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can be fairly drawn.'"

Schulz v. Pennsylvania Railroad Company, 350 U. S. 526.

The evidence in the instant case is likewise circumstantial, but this in no way lessens its probative value.[9]

[9] **Michalic v. Cleveland Tankers, Inc.**, 364 U. S. 325 (1960); **Rogers v. Missouri Pacific R. R. Co.**, 352 U. S. 500 (1957); **Holmes v. Goldsmith**, 147 U. S. 150 (1893); **The Robert Edwards**, 16 U. S. (3 Wheat.) 187 (1818); **Sitta v. American Steel and Wire Div. of U. S. Steel Corp.**, 254 F. (2d) 12 (6th Cir. 1958); **Korel v. United**, 246 F. (2d) 425 (4th Cir. 1957); **Gearhardt v. American Reinforced Paper Co.**, 244 F. (2d) 920 (7th Cir. 1957); **Pritchard v. Nelson**, 228 F. (2d) 878 (2nd Cir. 1955); **Williams v. Reading Co.**, 175 F. (2d) 32 (3rd Cir. 1949); **Pruitt v. Hardware Dealers Mut. Fire Inc.**, 112 F. (2d) 140 (5th Cir. 1940); **Sears Roebuck v. Peterson**, 76 F. (2d) 243 (8th Cir. 1935); **National Biscuit Co. v. Lutzky**, 22 F. (2d) 939 (6th Cir. 1927); **Penn Co. v. Zahner Metal Sash & Door Co.**, 273 Fed. 993 (6th Cir. 1921).

Petitioner submits that the Court of Appeals, on the first appeal of this case, erred in disregarding petitioner's evidence; it was admissible, and of overwhelming probative force. In the alternative, even if the evidence introduced at the trial must be ignored, the depositions and exhibits furnished in response to the mandate of the Fifth Circuit presented a question of fact which should have been resolved by the jury, in accordance with the principles stated in the foregoing cases.

On the second appeal, it was held that the evidence presented was incompetent, which, petitioner urges, was erroneous. Statements contained in the depositions to the effect that the witnesses heard the rim of an Oldsmobile was found near the body of the decedent, for which a sum of money was paid, as well as testimony regarding reports that the evidence gathered during the examination of defendant's car had been destroyed for a price paid did not violate the hearsay rule. Such statements were admissible for the purpose of establishing the fact that they were made; as explained in *6 Wigmore, Evidence*, § 1766, p. 180 (1940):

> "The classes of utterances thus exempt [from the hearsay rule] may be grouped under three heads:
>
> "3. Utterances used circumstantially as giving rise to indirect inferences, but not as assertions to prove the matter asserted." [10]

An example of the operation of this rule is found in *Scholle v. Cuban Venezuelan Oil Voting Trust*, 285 F.

[10] See **Aikens v. United States**, 282 F. (2d) 53 (10th Cir. 1960); **United States v. Gavagan**, 280 F. (2d) 319 (5th Cir. 1960); Note, 46 Iowa L. Rev. 210, 215 (1961); Note 40 Minn. L. Rev. 455 (1956); Note 5 Okla. L. Rev. 270, 273 (1952).

(2d) 318 (2d Cir. 1960), in which statements made to plaintiff, that certain individuals offered to lend him shares as collateral for a loan, were designated competent evidence which had been erroneously excluded, as shown by the following portion of the opinion:

> "Since the statements were relevant, they should have been admitted unless barred by some exclusionary rule. The court below excluded the evidence as hearsay, and no other reason for exclusion has been suggested. But the hearsay rule does not bar admission of the statements used circumstantially, since, when so used the primary focus of inquiry is whatever inferences can be drawn from the fact the words were spoken and not the truth of what was said."
>
> *Scholle v. Cuban Venezuelan Oil Voting Trust*, *supra*, at p. 321.

It is petitioner's position that these depositions were another link between Paris Theriot and the death of Byrd Mercer; as such, they were admissible, and furnished competent evidence from which the jury could draw reasonable inferences. Moreover, the photographs of defendant's car, together with the statements of the investigating officers concerning its appearance; the substances taken from it, as well as facts regarding the accident scene, were highly relevant, and presented facts upon which reasonable minds could differ, in accordance with the test for a jury question enunciated above. *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

With respect to the report of Mr. Ralph Snyder, it is petitioner's contention that this expert's opinions are

admissible, and do not deprive the jury of its function of finding ultimate facts, as held by the Court of Appeals for the Fifth Circuit. (R. p. 254). On the contrary, this Court has held such testimony proper in *Transportation Line v. Hope*, 95 U. S. 297 (1897), in which it was explained:

> "It is not an objection, as is assumed, that he is asked a question involving the point to be decided by the jury. As an expert, he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness." [11]
>
> *Transportation Line v. Hope*, 95 U. S. at p. 298.

The determination of the Court of Appeals relating to the admissibility of evidence is unduly restrictive and in conflict with the liberal policy of reception of evidence set forth in Federal Rules of Civil Procedure, 43(a), together with the authorities cited above.

An analysis of the evidence adduced by petitioner at the trial on the merits, as well as the evidence introduced subsequent to the reversal of the jury verdict, shows beyond question that facts are in contest and conflicting inferences can be drawn. Given these circumstances, the

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[11] Standing for the same proposition are these decisions: **Texas & Pacific Railway Company v. Watson**, 190 U. S. 287 (1903); **Union Insurance Company v. Smith**, 124 U. S. 405 (1888); **Nordmeyer v. Sanzone**, 314 F. (2d) 202 (6th Cir. 1963); **Fequer v. United States**, 302 F. (2d) 214 (8th Cir. 1962); **Carlson v. Chisholm-Moore Hoist Corp.**, 281 F. (2d) 766 (2d Cir. 1960); **Kennelley v Travelers Insurance Company**, 273 F. (2d) 479 (5th Cir. 1960), **Peoples Gas Company of Kentucky v. Fitzgerald**, 188 F. (2d) 198 (6th Cir. 1951).

federal system, ". . . under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U. S. 525, 537 (1958). There being no foundation for the appellate Court's finding that no jury question was presented, the judgment below should be reversed.

CONCLUSION.

In the case at bar the Court of Appeals for the Fifth Circuit, on the first appeal, reversed a jury verdict; on the second appeal, the same Court refused to allow the case to be submitted to the jury. A clearer example of "judicial erosion" of the "essential guarantee of the Seventh Amendment," described by Mr. Justice Black, in his dissenting opinion, with whom Mr. Justice Douglas and Mr. Justice Murphy concurred, dissenting, in *Galloway v. United States*, 319 U. S. 372 (1943), could not be imagined.

In the simplest terms, the issue is whether or not the Seventh Amendment will be enforced, or is without meaning or significance, and should be judicially deleted from the Constitution. No better expression of the true import of this question could be cited than the following portion of Mr. Justice Black's opinion:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the judge or jury must decide facts and, to the extent that we take this responsibility, we lessen the jury function. . . . I shall continue

to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances." *Galloway v. United States*, 319 U. S. at p. 407.

It is respectfully submitted that this Honorable Court reverse the judgment below and reinstate the jury verdict in favor of petitioner; or, in the alternative, reverse and remand the case to the district Court for a new trial.

Respectfully submitted,

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PROOF OF SERVICE.

I, H. Alva Brumfield, attorney for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief on Mr. Stanley E. Loeb, counsel for respondent, by mailing a copy thereof, postage prepaid, addressed to his office at 318 Richards Building, New Orleans, Louisiana.

Dated this day of February, 1964.

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM — 1963

No. 336

MRS. WANDA MERCER,
Petitioner,

versus

PARIS THERIOT,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENT

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BRIEF ON BEHALF OF RESPONDENT

STATEMENT OF THE CASE

This is a diversity suit grounded on Louisiana's Wrongful Death Statute*. Petitioner is the re-married widow of

*Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the children, . . . or spouse of the deceased, or either of them, . . . for the space of one year from the death.

Willie Byrd Mercer, who was fatally injured on December 18, 1955. Mercer's body was found alongside Louisiana Highway No. 1, at a point near Grand Isle, Louisiana, on the morning of December 19, 1955.

Alleging that respondent negligently ran into and fatally injured petitioner's decedent, petitioner filed this suit in United States District Court. Jurisdiction rests on the diversity of citizenship between petitioner, a citizen of the State of Mississippi, and respondent, a citizen of the State of Louisiana. The case was tried by jury and there was a verdict for petitioner in the sum of $25,000.00. Respondent timely moved for directed verdict and, after the verdict had been returned respondent renewed his motion and coupled with it a motion for a new trial. The motions were refused and respondent appealed to the United States Circuit Court of Appeals for the Fifth Circuit. On that appeal, which is herein referred to as the first appeal, the judgment of the District Court was reversed and the case remanded with directions (infra p. 10), 262 F.2d 754, certiorari denied, 260 U.S. 914. In accordance with the mandate of the Court of Appeals, a motion for a new trial was filed by petitioner and, after hearing and re-hearing, the motion was denied. Petitioner appealed and the District Court's refusal to grant her a new trial was affirmed by the Court of Appeals sitting en banc with four of the nine judges dissenting (316 F.2d 635).

STATUTES INVOLVED

1. United States Constitution, Amendment VII.

2. Federal Rules of Civil Procedure, Rules 30, 50 and 59.

3. Louisiana Revised Civil Code Article 2315.

4. 28 United States Code 2106.

THE FACTS

Respondent was in the automobile business and on Sunday, December 18, 1955, had gone to Grand Isle, Louisiana for the purpose of selling an automobile to one Leo Terrebonne (R. 35, 37). After concluding his business with Leo Terrebonne, who was a co-owner of the Fisherman's Restaurant & Bar in Grand Isle, respondent spent the afternoon with friends and having drinks (R. 38, 40). He left Grand Isle between 7:30 and 7:45 in the evening to return to his home in Golden Meadow (R. 41). He denies having any accident while enroute from Grand Isle to Golden Meadow (R. 41).

Petitioner's decedent, Mercer, worked on an oil rig in the Gulf of Mexico and usually returned to shore between 6:00 and 6:30 in the afternoon. He lived in a trailer camp about four miles from the landing which adjoined a bar and grocery and usually rode from the landing to his temporary residence with his foreman, Miller (R. 108-110). Mercer arrived at the landing on Sunday, December 18, 1955 and spoke to Miller in Harry's Bar (R. 111). That was

the last time he was seen alive by any witness. His body was found at approximately 6:30 in the morning of December 19, 1955 alongside Louisiana Highway No. 1, as aforesaid (R. 26; plaintiff's exhibit #1). There was no witness to any accident sustained by Mercer.

ARGUMENT

MAY IT PLEASE THE COURT:

In her brief, petitioner designates four questions presented to this Court and, for the convenience of the Court, respondent will discuss each question so raised in the order listed in petitioner's brief.

Whether the United States Court of Appeals for the Fifth Circuit Can Reexamine Facts Found By A Jury and Substitute Its Findings For Those of the Jury

The statement is misleading. The Court of Appeals in this case did not reexamine facts found by the jury and even a cursory reading of the opinion of the Court of Appeals in the first appeal (262 F.2d 754) reveals that the Appellate Court did not substitute its own findings of fact for those of the jury but examined the record in order to discharge its constitutional and statutory duty of ascertaining whether there was (1) evidence sufficient to support the verdict and (2) reversible error as respondent contended in his brief and assignment of errors. The constitutional right of the Court of Appeals to perform the functions imposed upon it by 28 United States Code 2106 cannot be seriously questioned and the cases cited by petitioner (Petitioner's

Brief 10-12) do not support the contention. To the contrary are Galloway v. United States, 319 U.S. 372, 63 S. Ct. 1077; Slocum v. New York Life Insurance Company, 228 U.S. 364, 33 S. Ct. 523; Moore v. Chesapeake & Ohio Railway Company, 340 U.S. 573, 71 S. Ct. 428.

The scope of review of the Court of Appeals on the first appeal was a determination, as aforesaid, of the sufficiency of the evidence to discharge the burden of proof resting upon her. In the instant case the burden of proof which petitioner must discharge is actionable negligence which proximately contributed to decedent's fatal injuries.

Under Louisiana law negligence is never presumed. It must be established by a preponderance of the evidence and judgments must be based on evidence, not suspicious circumstances or speculation. The basis of liability is fault. Jones v. Texas and Pacific Railway Company, 125 La. 542, 51 So. 582; Lange v. Illinois Central Railroad Company, 107 La. 687, 31 So. 1003; Larkin v. State Farm Mutual Automobile Ins. Co., 233 La. 544, 97 So. 2d 389; Evans v. Campbell, 9 So. 2d 91; Cali v. Cloverland Dairy Products Company, 21 So. 2d 166; Lowery v. Ashworth, 28 So. 2d 774.

Not only is there no evidence in the record that respondent drove his automobile into and against the person of petitioner's decedent, but there is not one word in the record to support the conclusion that respondent was negligent and that any such negligence proximately contributed to the injuries to and death of Willie Mercer.

Whether the United States Court of Appeals for the Fifth Circuit is Empowered to Withhold a Cause From the Jury When Evidence Has Been Presented From Which Reasonable Men Could Draw Different Conclusions and Inferences

The statement begs the question. On the first appeal of the instant case the Court of Appeals found that there was not sufficient evidence to support the jury verdict, consequently, that there was no evidence presented from which reasonable men could draw different conclusions and inferences. Theriot v. Mercer, 262 F.2d 754. This is not a situation wherein the Court of Appeals found facts contrary to those found by the jury but is like Galloway v. United States, supra, wherein the Court of Appeals found, as matter of law, that there was no competent evidence upon which the jury verdict could rest.

More pertinent to the present situation are the following circumstances. At the close of the evidence in this case respondent moved the District Court for a directed verdict in accordance with Rule 50(a) of the Federal Rules of Civil Procedure (R. 165). The district judge denied the motion (R. 166). After the verdict and within the time allowed by Rule 50(b), respondent filed motion for judgment notwithstanding the verdict and alternatively for a new trial under Rule 59 (R. 193). The motions were submitted to the District Court and that court denied the motions with reasons (R. 197). In the Court of Appeals respondent assigned as error the refusal of the District Court to grant judgment notwithstanding the verdict or a new trial.

A similar situation was presented in Montgomery Ward & Company v. Duncan, 311 U.S. 243, 61 S. Ct. 189, wherein it was held:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment n. o. v. and also denies a new trial, the judgment on the verdict stands and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n. o. v. and errors of law in the trial, as heretofore. The Appellate Court may reverse the former action and itself enter judgment n. o. v. or it may reverse and remand for a new trial for errors of law." 311 U.S. 253, 254.

Respondent does not suggest that the Court of Appeals in this case could have itself entered judgment n. o. v. or directed the District Court to do so. Such is not permitted in cases wherein the Court of Appeals reverses for insufficiency of the evidence. Slocum v. New York Life Insurance Company, supra. However, the Court of Appeals did not withdraw the case from the jury but, on the contrary, employed the most expeditious manner of permitting determination of whether petitioner could produce competent evidence which would justify submission of her case to the jury.

Whether Or Not Evidence Presented By Petitioner Was Incompetent

Whether the evidence submitted to the jury is sufficient to support a verdict in any case depends on the circumstances of the particular case. Among those circumstances must be the nature of the case, the burden of proof which must be discharged and, of course, the quality of the evidence offered. In the first appeal herein, the Court of Appeals applied Louisiana law to the extent that the State law is applicable. As has been heretofore stated, the basis of liability in this case is fault on the part of respondent and the term "fault" is synonymous with negligence. Under Louisiana law negligence is never presumed. To the contrary, the presumption favors respondent and the law presumes that he was not responsible for the injuries to and death of petitioner's decedent until his guilt is proven by a reasonable preponderance of the evidence. Larkin v. State Farm Mutual Automobile Insurance Company, supra. The failure of petitioner to have discharged that burden of proof is shown with particularity by the decision of the Court of Appeals on the first appeal herein and, indeed, even the dissenting opinions in the second appeal herein reflect that the additional evidence proffered by petitioner on her motion for new trial is essential to make out a case which could go to the jury (R. 261 et seq.). Study of the testimony and exhibits shows that there was no witness to any accident sustained by decedent; that the Sheriff's office suspected respondent merely because he had been seen at Grand Isle on the afternoon before decedent's body was found and even before the Sheriff's deputies knew that there was front-end damage to respondent's automobile (R. 58, 87). Plaintiff's evidence consists of speculation on the part of the Sheriff's deputies as to the nature of the material they found on and removed from respondent's automobile. There was no evidence as to the exact nature

of those items but the Sheriff's deputies were permitted to express unlearned opinions as to what those items appeared to be (R. 60, 61, 65, 70, 71, 75, 76, 79, 91, 92, 104).

The additional evidence proffered by respondent in support of her motion for a new trial speaks for itself. It is hearsay referring to hearsay, rumor and speculation, without any supporting evidence that respondent was involved in any accident with plaintiff's decedent or that respondent's automobile struck plaintiff's decedent.

That flight from the scene of an accident indicates probability of guilt presupposes that respondent was involved in any accident from which he fled and there is no proof whatever that respondent's car, which was being driven by respondent himself, struck petitioner's decedent.

In her brief, respondent includes under this heading the ex parte letter addressed to her attorney by Ralph H. Snyder of Oklahoma City, Oklahoma, on May 16, 1959, which appears as an appendix in the Record (R. 263 et seq.). Respondent does not know what the qualifications of Mr. Snyder might be. From an analysis of his letter aforesaid, it is apparent that the author thereof based his opinion in part on the speculative testimony given by the Sheriff's deputies and not on any examination of respondent's automobile, the place whereat decedent was found or an examination of decedent and, even if the report had been offered in evidence on the trial, it would have been inadmissible unless Mr. Snyder was subjected to cross-examination either in court or by deposition. The examination of the record of evidence adduced at the trial by the Court of Appeals on the first appeal and by the entire Court of

Appeals on the second appeal satisfied the majority of the Court of Appeals that neither the evidence adduced on the trial nor the evidence offered in support of petitioner's motion for a new trial constituted probative evidence sufficient to submit the case to the jury. There is no apparent error in the conclusion of the Court of Appeals aforesaid. The conclusion has been reached in light of the burden of proof imposed on petitioner in this case in accordance with State law.

The real constitutional question presented in this case is whether the mandate of the Court of Appeals in the first appeal violates rights guaranteed by the Seventh Amendment to the United States Constitution. Having found that there was no evidence to support the verdict, and having found prejudicial error committed at the trial, the Court of Appeals reversed the judgment and remanded the case to the District Court with directions, as follows:

> "Because, however, evidence, as distinguished from rumor and speculation, as to the why and how of the death of plaintiff's decedent and as to the responsibility of defendant for it, may have been or may be discovered, we order the judgment reversed and the cause remanded with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial."

The Seventh Amendment provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The jurisprudence of this Court is barren of any case directly in point. Resolution of the problem in light of present day practice and the Federal Rules of Civil Procedure suggest the correctness of the mandate. Gasoline Products Co. v. Champlin Ref. Co., 283 U.S. 494, 51 S. Ct. 513.

Being mindful of the decision of this Court in Slocum v. New York Life Insurance Company, supra, wherein Mr. Justice Van Devanter, speaking for the Court said:

> "The adjudicated cases dealing with the origin, scope and effect of the amendment are numerous and so comprehensive that little room for original discussion remains."

respondent will limit his discussion to whether the mandate of the Court of Appeals, aforesaid, violates the provisions of the Seventh Amendment. The dissenting opinion of Mr. Justice Hughes in the Slocum case eloquently expreses respondent's position and, of course, the dissenting opinion aforesaid was written twenty-five years before the adoption by this Court of the Federal Rules of Civil Procedure.

The mandate under consideration took advantage of the tools afforded by the discovery provisions of the Rules, particularly, Rule 30, which provides for Depositions Upon Oral Examination. The mandate directed the District Court to allow petitioner opportunity to make a satisfactory showing that on another trial there might be produced evidence of sufficient probative force to justify submission of the cause to the jury, and relies upon the ruling of law by the district judge as to the legal quality or admissibility of such proffered evidence. The trial judge afforded petitioner wide latitude in procuring the depositions of witnesses, some of whom had testified on the trial, without any limitation and, after careful consideration of the depositions which were filed in support of petitioner's motion for a new trial, and, after twice considering the motion for a new trial, held with stated reluctance that "This evidence, while persuasive, would be inadmissible on a new trial under the hearsay rule." (R. 230-234). Had the district judge granted petitioner's motion for a new trial the evidence offered in support of the motion would have been excluded and, indeed, had a new trial been granted, much of the evidence admitted on the original trial would have been excluded. So the futility of granting petitioner a new trial becomes apparent.

Nowhere in the Constitution is there any prohibition against a Circuit Court reviewing the record of a trial for the purpose of ascertaining whether the verdict is supported by competent evidence. Slocum v. New York Life Insurance Company, supra; Galloway v. United States, supra; Aetna Insurance Company v. Kennedy, 301 U.S. 389, 57 S. Ct. 809. Having discharged that function, the Court of Appeals in this case instead of paying lip service to the

Seventh Amendment and slavishly ordering a new trial, employed the up-to-date legal machinery afforded by the Federal Rules of Civil Procedure and fulfilled the constitutional requirement of giving to petitioner full opportunity to show to the satisfaction of the District Court that on another trial competent evidence would be offered in support of her claims. Petitioner took full advantage of the opportunity and failed to convince the District Court that on another trial evidence of probative value would be so offered. As aforesaid, her motion for new trial was twice heard by the district judge and his ruling was the subject of appeal and review by all nine judges of the Court of Appeals for the Fifth Circuit.

The mandate was not dispositive of petitioner's case as were the mandates in Slocum and in Aetna Insurance Company, which directed the entry of judgment for the appellant in each said case. Here the mandate protected petitioner's constitutional rights and also protected the business of the Courts and the rights of respondent against fruitless use of the Court's time and expenditure of respondent's costs of defending the suit anew.

In Gasoline Products Company v. Champlin Ref. Co., supra, this Court said:

> "It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance. All of vital significance in trial by jury in that issues of fact be submitted for determination with such instructions and guidance by the court as will afford opportunity for that consideration by the jury which was secured by

> the rules governing trials at common law . . . Beyond this, the Seventh Amendment does not exact the retention of old forms of procedure . . . It does not prohibit the introduction of new methods for ascertaining what facts are in issue . . ." 283 U.S. 494, 498.

All litigation must sooner or later come to an end. The District Court and the Court of Appeals concluded that a new trial would not have availed petitioner the relief she sought, not on factual grounds but on legal grounds.

REVERSIBLE ERROR COMMITTED AT THE TRIAL

Petitioner has not discussed in her brief the holding of the Court of Appeals in the first appeal that there was reversible error committed at the trial without reference to the absence of evidence sufficient to take the case to the jury. Respondent assumes that petitioner concedes that there was reversible error committed on the trial and, since the issue has not been raised by petitioner, respondent does not feel constrained to discuss it here.

CONCLUSION

In the instant case the Court of Appeals performed its function of examining the record for the purposes of determining whether there was evidence sufficient to support the verdict and whether there was reversible error committed on the trial. The Court of Appeals directed the District Court to entertain a motion for a new trial and to permit petitioner full opportunity to show that on a new trial competent evidence would be offered in support of

her case. Petitioner was unable to supply the District Court with such evidence and the motion for a new trial was denied. Petitioner has had full review of the District Court's denial of her motion.

Neither the first appeal nor the second appeal deprived petitioner of her constitutional right to trial by jury since trial by jury presupposes submission to the jury of evidence competent in law and sufficient to make out a case for jury determination.

The judgment below should be affirmed.

Respectfully submitted,

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Attorney for Respondent

PROOF OF SERVICE

I, Stanley E. Loeb, attorney for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served a copy of the foregoing brief on H. Alva Brumfield, Esquire, attorney for petitioner, by having mailed a copy thereof, United States postage prepaid, addressed to him at 205 American Bank Building, Baton Rouge, Louisiana, on March , 1964.

Stanley E. Loeb

SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
MAY 26 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 336

WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

PETITION FOR REHEARING

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Paris Theriot

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 336

WANDA MERCER,

Petitioner,

versus

PARIS THERIOT

Respondent.

PETITION FOR REHEARING

Your respondent, Paris Theriot, prays that this Court grant rehearing as to the judgment rendered herein on May 4, 1964, that said judgment be recalled and set aside and that the judgment of the Fifth Circuit Court of Appeals en banc, rendered on March 14, 1963 and that of the District Court rendered on January 20, 1961 denying plaintiff's motion for new trial, be reinstated and affirmed.

REASONS FOR REHEARING

The basis upon which petitioner seeks rehearing herein is:

1. Due to the unusual posture in which this case reached this Honorable Court, after a second application for writs of certiorari, this Court, through inadvertence, has disposed of important issues never yet decided by the Fifth Circuit Court of Appeals;

2. In so doing, this Honorable Court, has resolved crucial issues not briefed before it, thus sanctioning a wholly novel and highly inequitable procedure whereby petitioner has been deprived of an orderly disposition of all crucial issues;

3. Conceding, arguendo, that the majority herein was correct in holding that there was a sufficiency of evidence to require submission of the case to a jury, the only proper judgment to be rendered herein would be a reversal and a remand, not the revival of the original District Court judgment. The original District Court judgment had been "legally dead" for years and this Court had assisted in its interment by performing the last rites via denial of the first application for certiorari.

BY-PASSING THE FIFTH CIRCUIT

The unusual effect of the majority decision herein cannot precisely be described in conventional legal terms. The net result, as we will show below, has been to reverse two decisions of the Fifth Circuit of Appeals on the sole issue which was the basis of both decisions and to dispose of other crucial issues noted, en passant, but never made the basis of decision by the Fifth Circuit in either instance.

Our position here is not so much a challenge to the bare legal right of this Court to reach such a result, but rather we question the propriety and justice of this unique procedure.

To recapitulate briefly, this case arose in Grand Isle, La. as a result of a supposed "hit and run" accident to which there were no witnesses. *We shall not attempt to reopen, in this application for rehearing, the issue as to whether or*

not the circumstantial evidence was sufficient to require giving the case to the jury. For the sake of argument, we will assume, for the purpose of this petition, that there was sufficient evidence because a majority of this Court has so decided.

The jury awarded plaintiff $25,000.00. On appeal to the Fifth Circuit Court of Appeals, appellant, Paris Theriot, presented three principal specifications of error, appearing on Pages 8 and 9 of the original brief on behalf of appellant, reading as follows:

> "Specification of Errors to be Relied on
>
> "1. The Trial Court erred in denying defendant's motion for directed verdict made at close of plaintiff's case.
>
> "2. The Trial Court erred in denying defendant's motion for directed verdict made at close of defendant's case.
>
> "3. The Trial Court erred in denying defendant's motion to set aside the verdict and judgment and enter judgment for defendant."

Alternatively, the appellant complained of alleged errors in the instructions and denial of others, plus the fact that the verdict was excessive. The challenge to the sufficiency of the evidence brought into focus, not only the weak circumstantial nature of such evidence, but also called sharp attention to the fact that much of such circumstantial evidence was of the rankest hearsay type. Moreover, in reviewing the rather bizarre trial, the Court noted other prejudicial aspects, such as the inflammatory remarks of plain-

tiff's counsel. After a detailed review of the evidence, and the prejudicial aspects of certain incidents in the trial, the Fiftn Circuit declared, through Chief Judge Hutcheson,

> "In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominating the trial, deprived the defendant of his day in court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption." (262 F. 2d 75A)

Restated in simpler language, we submit that the foregoing paragraph means simply this: Even if the evidence in the case had been sufficient to support the verdict, the judgment would have to be reversed because of prejudicial errors quo ad admission of hearsay evidence as to bribery, corruption, etc. After the quoted paragraph above, the Fifth Circuit immediately continues:

> "There remains only the determination whether, with the record stripped of all its erroneous and prejudicial occurrences, the admissible and relevant evidence in the case was sufficient to support a verdict and whether, if not, the case should nevertheless be remanded for a new trial in accordance with law." (262 F. 2d 259)

After discussing further the insufficiency of the evidence the court concluded:

> "Because, however, evidence, as distinguished from rumor and speculation, as to the why and how of the death of plaintiff's decedent and as to the responsibility of defendant for it, may have been or may be discovered, we order the judgment reversed and the cause remanded with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." (262 F. 2d 760)

The plaintiff thereupon sought relief from this judgment by applying to this Court for a writ of certiorari, which was denied. 359 U.S. 983, 79 S. Ct. 941; rehearing denied, 360 U.S. 914.

Thereupon, in response to the mandate of the Court of Appeals, the District Court reexamined the sole matter he was directed to consider, namely, whether on a new trial "evidence of sufficient probative force to justify submission of the cause to the jury" might be shown. (262 F. 2d 761)

After full hearing on this issue, the District Court concluded:

> "This court has carefully studied the additional evidence submitted in support of the motion for new trial. This evidence, while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. 30; fol. 352)

The motion for a new trial was therefore denied and, after due argument, an application for a re-hearing of this motion was denied January 20, 1961. (R. 233; fol. 356)

It was from this order alone (described as a "final judgment" by plaintiff) that an appeal was taken. (R. 234; fol. 359). On appeal, the question was raised as to whether or not the denial of a new trial, under the circumstances, was even appealable. In holding that, under the peculiar circumstances, the order was a "final decision" and therefore appealable, the Fifth Circuit declared:

> "Here, however, the plaintiff's motion served a different function. It was filed in direct response to the invitation in this Court's mandate that the plaintiff present new evidence. If the plaintiff had made 'a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury [would] be offered,' the plaintiff would have been entitled to a 'judgment for a new trial.' Denial of the motion was a final decision by the district court that the plaintiff had failed to meet the terms of the mandate. The Court therefore holds that in the circumstances of this case the denial of the motion was an appealable order." (316 F. 2d 638)

Moreover, on this second appeal, the Fifth Circuit, en banc, declared:

> "The second appeal does not require a reconsideration of the merits. The narrow questions before the Court en banc are whether the district court properly construed the mandate and whether the district court abused its discretion in holding

that the plaintiff failed to meet the terms of the mandate, that is, failed to make a satisfactory showing that the *additional* evidence would justify submission of the case to the jury. (316 F. 2d 638)

BASIS FOR APPLICATION FOR CERTIORARI WAS LIMITED TO COURT'S ACTION QUO AD SUFFICIENCY OF EVIDENCE

Plaintiff herself, in applying for certiorari, stated to this Court, as a basis for such review, the following "REASONS FOR GRANTING THE WRIT", and no others:

> "I. IN REEXAMINING FACTS PREVIOUSLY FOUND BY THE JURY, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT VIOLATED THE MANDATE OF THE SEVENTH AMENDMENT AS WELL AS THE SETTLED JURISPRUDENCE OF THIS COURT." (Petition for certiorari, page 8, 9)
>
> "II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING PETITIONER'S EVIDENCE WAS INSUFFICIENT TO JUSTIFY SUBMISSION OF THE CASE TO THE JURY" (Petition for certiorari, page 14)

DISPOSITION OF OTHER ISSUES, BOTH SURPRISING AND PREJUDICIAL

With the case in the above posture, defendant-respondent stated in his original brief to this Court:

> "Petitioner has not discussed in her brief the holding of the Court of Appeals in the first appeal

> that there was reversible error committed at the trial without reference to the absence of evidence sufficient to take the case to the jury. Respondent assumes that petitioner concedes that there was reversible error committed on the trial and, since the issue has not been raised by petitioner, respondent does not feel constrained to discuss it here." (Respondent's brief, page 14)

As noted above, the sole actual basis of the Fifth Circuit's original decision was the lack of sufficient evidence. The other prejudicial matters noted in the opinion were certainly not the basis of decision and the clear import of the opinion was that there were numerous other prejudicial matters, including hearsay, errors in instructions, and inflammatory remarks, *which might have been made the basis of decision*. It is clear that the whole focus of the Court's attention below was upon the issue as to sufficiency of evidence and the Fifth Circuit never spelled out its disposition of the other errors noted. However, in an utterly surprising development, this Court, after stating its right to "consider all of the substantial federal questions determined in the earlier stages of litigation" as well as "those that were before the Court of Appeals upon the second appeal", (Opinion, Page 2) then proceeded to declare:

> "We consider first the alleged errors in the conduct of the trial." (Opinion, Page 2)

Your Honors then proceed to analyze "alleged errors in the conduct of the trial", none of which were noted by formal specification of error and none of which, per se, formed the basis of decision. Your Honors then proceed to dispose of these supposed "alleged errors", which cover A.

Erroneous Instructions; B. One instance of hearsay evidence; and C. Prejudicial and inflammatory remarks of counsel.

After disposing of these three points, the majority opinion then declares:

> "Our examination of the trial record reveals not only that there were no errors affecting substantial justice, but also that the trial judge conducted the trial with scrupulous regard for the litigants' rights." (Opinion, Page 3)

The Court then goes on to consider "the sufficiency of the evidence adduced at trial".

We submit that at the time this case was presented for argument to Your Honors, there was not the slightest indication that this Court, even if it reversed the Fifth Circuit, would go as far as it did. From respondent's standpoint, the worst that could reasonably be expected would be a reversal of the Fifth Circuit's decision and the ordering of a new trial. Irrespective of the power or bare legal right of this Court to do what it did, there was certainly no reason to suspect that issues would be decided which had never been disposed of formally below and which could easily have been dispositive of the case, regardless of this Court's determination of the issue as to sufficiency of the evidence. Thus, although the Fifth Circuit noted that there were many prejudicial matters in the trial, it neither made them the basis of the decision, nor did it indicate that there may not well have been *other grievously prejudicial errors not disclosed.*

THUS, IN ONE SHORT, ALL-ENCOMPASSING PARAGRAPH, THE COURT HAS UNDERTAKEN TO DECLARE THE ENTIRE RECORD FREE OF PREJUDICIAL ERROR. This was done without benefit of briefing on the other issues, noted but not passed upon. The remainder of the record, we submit, was "terra incognita" when proceeding without adequate aids to legal navigation. The risk of error was equivalent to that of Christopher Columbus when essaying to cross an uncharted sea by "dead reckoning" and without the aid of celestial navigation. Proceeding in this manner, we submit that this Honorable Court has obviously gone far off course, as indicated by the following:

ERRORS NOTED BELOW BUT NEVER YET DISPOSED OF HERE OR BY THE FIFTH CIRCUIT

The record discloses that, in addition to the error of the Trial Court as to one aspect of the general charge to the jury, there were at least two other errors complained of, namely, failure to give special requests of the defendant *No. Three and No. Six* (R. 187) Failure to give these special charges was specifically objected to. (R. 191)

This Court, while holding that there was no prejudicial error committed by the Trial Court quo ad that portion of the charge which was later corrected, is completely silent as to possible error in regards to special requests of defendant No. Three and No. Six, supra. *The text of these special charges do not appear in the record for the simple reason that no one was concerned with them below.* They were not listed in the designation of the record in either appeal and if by chance a copy of these instructions should physically be found among the original exhibits

sent up to this Court, there is no valid basis for their being there, since such requests are neither "pleadings" nor "exhibits" within the purview of the designation of the record or accepted legal parlance. (R. 200, 205, 235)

We respectfully submit, therefore, that it is obvious that this Court could not have weighed the possible error on the refusal of these special requests as to instructions *because the Court simply does not know what these requests covered.*

The foregoing is merely the most glaring example of the dangers involved in the procedure sanctioned here. Even as to the error below concerning the admission of highly prejudicial testimony as to the alleged "payoff", the Court's abrupt dismissal of this matter is focused on the narrow point that no objection was made and that counsel for defendant virtually waived the error by pursuing the point of further examination of the witness. This conclusion overlooks entirely the realities of life during heat of trial. THE HIGHLY PREJUDICIAL TESTIMONY AS TO THE ALLEGED "PAY-OFF" CAME SUDDENLY AND WITHOUT WARNING. IT CAME IN ONE SWIFT THRUST, WITHOUT TIME FOR OBJECTION. The highly damaging question was posed, without warning and completely out of context with the trend of the questions being asked. We quote the following examination of the witness who was the original source of the highly prejudicial hearsay testimony as to bribery:

"Q. And you did not see the towel or the clothes?
A. I saw no clothing. The only thing that I saw were the two blankets at the scene of the accident which I assume was used to keep him covered, but other than that, I haven't seen

a bit of clothing that was worn by the victim or clothing or any part of his clothes that were taken from Mr. Theriot's car or any other place.

Q. OFFICER FOLSE, DID YOU LEARN THAT THERE HAD BEEN A PAYOFF IN THIS CASE?

A. I WAS TOLD, HEARSAY.

Q. You was told there was?

A. I was told that there was a pay-off.

MR. BRUMFIELD:
That is all." (R. 149, 150)

The foregoing highly damaging testimony came quickly in response *to a question which was deliberately leading.* There was no time for objection and the highly inflammatory matter was tossed directly into the lap of the jury. The damage was done and no amount of instruction by the Court thereafter could erase from the jury's mind the prejudicial impact of this rank hearsay. Thereafter, counsel did the only thing he could do which would have any practical effect to reduce the damage. He sought to nail down the fact that the reference to the "pay-off" or bribery was based on the wildest rumor. Thus, counsel for defendant asked:

"Q. Mr. Folse, who told you there had been a pay-off in this case?

A. Trooper Milliet.

Q. And that is all you know about it? Just that Milliet told you there had been a pay-off?

A. That is the only one. We had a conversation one night while I was on duty and happened to stop by, and I happened to mention this

> case. He said, I asked him, "Did you find out what happened to the evidence?" "Oh", he said, "Prudhomme was paid off."
>
> Q. He said that Prudhomme was paid off?
>
> A. He said that Prudhomme was losing weight over it, or something like that, you know, in a regular conversation that goes on.
>
> Mr. Hughes: That is all. Thank you." (R. 152)

Thus, there was a great deal more to be weighed in considering the prejudicial effect of this error over and above the mere technical conclusion that the defendant voluntarily went into the matter. Nor is there necessarily any question involved here as to whether or not the injection of this prejudicial and inflammatory matter was due to the fault of counsel for either side or the Trial Court itself. This may well have been one of those unforeseen and unfortunate developments which occasionally occur without anyone's fault but nevertheless destroy absolutely the possibility of a fair trial.

Thus, in its summary disposal of this issue, without benefit of briefing, we submit this Court has erred seriously. *There are other instances where prejudicial error may have* been committed, errors which have not been discussed at *all in the majority opinion herein*. These relate to such matters as the unnecessary admission of portions of a hearsay statement by the device of allowing a written statement by the officer allegedly bribed to get before the jury. (R. 70) Overlooked entirely also is *the complete mystery as to the discrepancy shown in the record as to the date of death*. This issue was specifically raised by counsel for defendant in the Trial Court and the mystery as to this confusing point has never yet been solved. (R. 174)

In conclusion, we submit that there are other instances of possible prejudicial error as to which this Court has never been briefed and which have never been mentioned in the majority opinion. We respectfully suggest therefore that respondent-defendant is entitled to a rehearing in this case in order that crucial issues, never yet considered by this Court, may be disposed of by orderly and normal procedures.

For the foregoing reasons respondent-defendant respectfully prays that a rehearing be granted herein.

Respectfully submitted,

STANLEY E. LOEB
318 Richards Building
New Orleans, Louisiana 70112
Attorney for
Respondent-Defendant

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay,

STANLEY E. LOEB
Attorney for
Respondent-Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for rehearing and brief in support on behalf of respondent-defendant has this day been served upon counsel for petitioner by placing same in the United States mail this day of , 1964, addressed as follows: H. Alva Brumfield, Esquire, 205 American Bank Building, Baton Rouge, Louisiana.

STANLEY E. LOEB